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THE ALL INDIA REPORTER 1945 JOURNAL SECTION

Law Reporting.

Speech delivered by Rao Bahadur, D. D. Datar, Chief Editor,
the All India Reporter, at the Rotary Club, Nagpur.

When we enter a lawyer's office, what is the thing that impresses us as being its characteristic feature, its most prominent feature—something which easily and immediately brings home to us the fact that we are in a lawyer's office? It is the glass almirahs full of books neatly bound in leather and calico and with gilt letters on their backs and all, more or less of a uniform appearance. Books are not so prominently in evidence in other learned professions, as for instance, the medical profession. I am not saying that the practice of medicine does not call for assiduous study. But books are not resorted to so constantly in the medical profession as in the legal. The nature of the work that a lawyer or Judge has to do is such that he simply cannot get on without books, however learned he may be. And what a vast number of books is required by him.

No wonder, for law covers the entire field of human activity and as the complexities of modern life increase and more and more departments are added to life's activities, the field of law is bound to widen also and more and more books will be required by the legal profession. And all these books are required not only to study and understand the law at home but also for use in the Courts as a lawyer has to quote authority for every point of law that he urges. He must cite a statutory provision or rule or some precedent or some book which is accepted as authority.

The publication of law-books is thus a very important branch of the printing and publishing business in any modern country and I shall briefly describe the nature of the different kinds of legal publications that are brought out to meet the requirements of the legal profession.

A lawyer's library can be divided into three parts as: (1) Law Reports, (2) Digests and Indexes and (3) Commentaries. Of these classes of books, Law Reports are the most important and as such they constitute the bulk of the library. I shall deal with these classes of books one by one.

I shall first deal with Law Reports. It is a common knowledge that every science presupposes certain principles as taken for granted which are beyond scepticism and need no proof to prove their correctness. They are self-evident truths and are idiomatically called axioms in Mathematics and maxims in Law. As the science of Mathematics is founded on axioms the science of Law is founded on maxims. The legal jurisprudence is nothing but an elaborate exposition of legal maxims. Some of these maxims are "Equity is equality", "Ignorance of law is no excuse", etc. Of these maxims the one "Ignorance of law is no excuse" denotes universal omniscience of the laws of the realm. It demands that every man must know law and his ignorance of it will not save him from the consequences of its breach. So more the legal knowledge spreads the better governed and disciplined is the society. Respect for law is the very backbone of orderly society and peace. It is a force which creates humanity in man and protects it as the law of gravitation maintains the stability of things on earth. Thus the publication of law is the sacred duty. This is how the law reporting has come to enjoy an eminent place in journalism.

Growth of Law.—No system in the world can claim so exuberant a growth as a legal system. Its speed of expansion can rival only with that of time. The most ancient of all laws is the Hindu Law. It emanated from day to day life and actions (which subsequently became customs) of the Hindus which ultimately came to be recorded in Smruties by ancient learned sages with their decisive commentaries. Roman Law also had

its origin in the life of the people and was expounded authoritatively by the Roman Jurists. With the fall of Roman Empire its growth stopped. Then followed the English Law. The development of English Law is different from that of other legal systems. In England it is the Judges who are the creators of English Law.

The remarkable authority of the judicial precedents under English Law is mainly due to authoritative and unassailable positions occupied by the English Judges. They were the perennial sources of authoritative decisions and as times passed on, the English Law Common Law and Equity assumed magnificent proportions in the shape of judicial decisions.

In India the growth of law is no less astounding. A reference to the Civil Court Manual will reveal that India has 203 Civil Acts in its judicial armoury. Even if we take account from the years 1935 to 1944, the Central Legislature has to its credit 265 Acts and 192 Ordinances from 1939 to 1944. Apart from these Central enactments there are still more powerful battalions of Provincial Acts. To illustrate, I may quote the following figures. Bengal 101, C. P. 202, Madras 209, Bombay 183.

Now, rack your brains with mathematical calculations for a while. In India there are seven High Courts established by Letters Patent, two Chief Courts, one Judicial Commissioner's Court and one Federal Court. Making a modest estimate, all these eleven Courts must be having about eighty Judges. These eighty Judges have been continuously pronouncing judicial decisions for the last so many years. Pen and paper are necessary to determine their voluminous output. Just for the sake of your information I will tell you that average number of cases reported per year by the All India Reporter is about 2200. I think this is enough to show at what terrific speed the case law is growing and how vitally important is its reporting.

Precedents. — I am sure every one of us here has heard about legal or judicial precedents. It is a technical term which means a previous case taken as an example for subsequent cases or as justification. In other words precedent is one which serves as a rule or pattern in deciding a case in hand. These are the decisions of the Privy Council and High Courts possessing different binding values. Some decisions are absolutely binding and others are only persuasive. The decisions of the Privy Council are binding on all the High Courts. High Courts *inter se* the decisions of the one High Court are only persuasive in regard to other High Courts and not absolutely binding.

But in any case, all decisions are of value to the lawyer and the Judge. Apart from their operating as authorities, in innumerable cases, the reasoning contained in the decisions is of very great value to lawyers and Judges in considering the law applicable to the cases which they have to handle.

The function of law reports is to make available to the Bench and the Bar this valuable material in an easily accessible form. For imagine a lawyer having to explore, on his own, the records in Courts in order to find out an appropriate precedent for his own case. A lawyer may work for his whole life and yet may not succeed in collecting all the appropriate precedents.

History of Law Reporting in England. — Originally even in England, there were no published reports of decisions. (Printed reports are said to date from 1292). Ever since records came to be kept, pleadings and judgments in all cases were recorded on the plea rolls to which the Judges and more eminent pleaders had access. Then came the Year Books which cover a long period, from 1307 to 1537. These contained a sort of report of cases. But the reports were not like the modern law report. They were something like a newspaper report—an exact transcript of what took place in the Court, of the statements of counsel, the observations of Judges whether strictly relevant to the case or not and even the observations of the members of the bar present. Occasionally Judges read a lecture in the course of the arguments for the benefit of the apprentices and that too is recorded. The moods of the Judges are noted. One finds also the views of the reporter as to the merits of the performance of the Judges and practitioners concerned. Very often only pleadings and discussions are given and not the judgment.

The Year Books continued till the year 1537. Then followed an era of private reports. These were published by lawyers from notes taken by themselves. We have a vast number of such reports. The reports invariably bear the name of the reporters such as Benloe and Dalison's reports, Dyer's reports, Plowden's reports, Brownlow and Goldsborough's reports, Croke's reports, Burrow's reports and so on.

Durnford and East (1785-1800) began the practice of reporting cases term by term Reports. Till then reports used to be published long after the decisions were pronounced, in some instances, even after the life time of the Judge and the Reporter. We have also valuable reports of trials in the volumes known as State Trials.

From 1823 onwards began to appear a number of publications in which the reporter's name was not mentioned in the title of the publication. The first of the series, the Law Journal Reports made its appearance in 1823 and continues till to-day. In 1845, the Law Times appeared. There were also other publications like the Weekly Reporter, the Times Law Reports, etc.

In 1866 the Incorporated Council of Law Reporting was established in England. This is a private body but has a quasi-official character since its members are representatives of the Inns of Court and the Law Society. The Council employs an Editor and a staff of reporters and produces a uniform series of reports of cases in all the superior courts. The reports published by the Council of Law Reporting are known as the "Law Reports."

The other publications above-mentioned also continue now side by side with the Law Reports published by the Incorporated Council of Law Reporting.

Our system of law being mainly based on the English system, the English Reports naturally occupy a very important place in our law libraries.

Besides the English Reports we shall find in many law libraries in India, Scotch, Irish and Colonial Reports and American Reports. In India, there are both official and private law reports. Each Provincial Government publishes in the form of a monthly journal reports of decisions pronounced by the respective High Court. The Editors and Reporters for these journals are appointed by the Government. These Reports also contain cases decided by the Privy Council on appeal from the respective High Courts.

Besides these official publications, there are private publications which report the decisions of particular High Courts and of the cases decided by the Privy Council on appeal from the respective High Courts—such as the Allahabad Law Journal, Bombay Law Reporter, Calcutta Weekly Notes, Madras Law Journal etc.

There are 10 Official Reports and about 20 non-official Reports. About 2000 cases are reported on an average, every year though in some years the number exceeds 3000. The number has considerably fallen below 2000 in recent years owing to scarcity of paper.

There is a good deal of overlapping in these reports, the same case being reported in several of these journals. This is also the case in England.

The All India Reporter which is published from here and the Indian Cases of Lahore are conceived on an all-India basis. These journals report the decisions of all the superior Courts in India including the Federal Court, the different High Courts and the Judicial Commissioner's Court and Chief Courts, and are very comprehensive. They also contain reports of cases of the Privy Council which go up on appeal from this country. Many cases on appeal from the colonies also are reported in these journals.

The mode of reporting in the different journals is more or less the same. The judgments are generally given in extenso though lengthy discussions of pure matters of fact or evidence are omitted or condensed. The points of law laid down by the judgment are culled out and given at the beginning of each case. They are technically called "Head Notes." Facts and arguments are also given when necessary for the understanding of the judgment.

Some of these publications contain a journal section in which are given Articles on Legal subjects, editorial comments, reviews of law-books etc.

Evolution of Law Reporting.—Now I shall say something about the evolution of law reports in this and other countries.

In our country, the law report is purely a product of the British system of administration of law that was introduced here as a result of the British conquest. The idea does not seem to have taken shape in Hindu jurisprudence. We have something like a law report in the *Fatwa Alamgiri* which is a collection of fatwas or decisions of Courts during the reign of Aurangzeb. The fall of the Moghal Empire and the resultant confusion, however, made further progress impossible till the establishment of British Courts in India.

As regards the Privy Council, we have reports from the beginning of the last century. The reports being from 1809 (Acton, Knapp, Moore's Indian Appeals etc). But

the regular reports commence only from 1833, when the Judicial Committee was organised. Before that a special Committee had to be organised for each case and the cases heard also were not many.

The High Courts were established in 1865 in Madras, Bombay, Calcutta and Allahabad. Before that there were the Supreme Courts and Sudder Dewany and Sudder Nizamut Courts. Regular reports began from the establishment of the High Courts. But even before that, there were various law reports. For instance, an Act of 1843 required the judgments of the Sudder Court to be recorded in English and the decisions came to be issued monthly for the benefit of the public from 1845. In 1850, marginal abstracts of the decisions came to be added. The decisions of the Agra and Madras Courts came to be similarly published in 1846 and 1849 respectively. The series continued right up to the establishment of the High Courts. In 1850, one Mr. Bellasis published a volume of the reports of the decisions of the Sudder Dewani Adawlut of Calcutta from 1840-1848. These were for the most part, decisions of the Full Court. In 1851, a monthly series of Nizamut Adawlut decisions began to appear. In Madras also, about the same time monthly reports of the Sudder Foujdari Adawlut began to appear. Sudder Foujdari Adawlut Reports of Bombay from 1827-1846 were published in 1848. Since 1844, Select Reports, that is, cases selected out of the monthly reports as being fit to be treated as precedents were published with notes. The publication was discontinued later on. Then we have Borrodaile's Reports of the decisions of the Bombay High Court. Borrodaile was a Judge of the Sudder Adawlut of Bombay. There are also various Reports of the Supreme Court of Calcutta—Morton's Reports, Fulton's Reports, etc.

After the establishment of the High Courts, we have for the Calcutta High Court, regular reports. The Indian Jurist (O. S.), Weekly Reporter, Hay's Reports, Marshall's Reports, Coryton's Reports, Hyde's Reports, Bourke's Reports etc., cover the period from 1862 to 1868. From 1868 we have the Government publication known as the Bengal Law Reports. The Sutherland's Weekly Reporter covers the period from 1864 to 1876. Hay and Marshall are much prized Reports. They contain some valuable judgments of Sir Barnes Peacock.

As regards the early history of reporting in Madras, it may fairly be said that modern law begins in Madras with the Madras High Court Reports (1862-1875). One rarely goes beyond those reports although there are both Supreme Courts and Sudder Dewany Adawlut Reports for Madras as for Bengal. The Madras High Court Reports contain some of the best written judgments of the Madras High Court.

For Bombay, the modern law commences with the Bombay High Court Reports (1863-1875).

The various High Court Reports were published by the Government. But there was no statute dealing with the subject. The Indian Law Reports Act of 1875 enacted that no Court was bound to hear cited cases not reported in official Reports. From this period begins the series known as the Indian Law Reports for each High Court. They are the official publication reporting monthly the decisions of the respective High Courts. As already said there are at present 10 such official publications including the Federal Court Reports for the Federal Court.

The public were not satisfied with the reporting in these official publications. The reporting was neither prompt nor efficient. Important rulings were not reported. All this gave rise to private reports. In each Province, eventually, there have come into existence two or three private publications in addition to the Government Reports, so that we have about 20 such journals now in addition to All India Journals like the All India Reporter and the Indian Cases.

In each Province, it is only the decisions of the Privy Council and of the particular High Court that are binding as authorities. But the questions that arise for consideration are so many and so varied that the decisions of a particular High Court are often insufficient to clear any point with the necessary result that resort is had to the rulings of other High Courts.

I can give you interesting information about the development of Scottish and Irish law reporting but the time at my disposal being over I have to postpone it to next occasion.

TRUTHFUL CHARACTER OF INDIAN WITNESSES

by THAKUR PRASAD DUBEY, M.A., LL.B., P.C.S. (*Judicial*), Farrukhabad.

It is a well-known fact that Judges even of the Highest Tribunals of the land have very often expressed their opinions that witnesses in India are greater liars than elsewhere and such an opinion yet continues to be entertained throughout the country by very many Judges. The Judicial Committee made the following observations in a very old case reported in 4 M. I. A. 431¹ at p. 441 :

"It is quite true that such is the lamentable disregard of truth prevailing among the native inhabitants of Hindustan that all oral evidence is necessarily received with great suspicion."

Their Lordships again affirmed their conviction in another case reported in 11 M. I. A. 177² where it was said :

"In a native case it is not uncommon to find a true case placed on a false foundation and supported in part by false evidence."

C. D. Field, an old eminent commentator of Law of Evidence, has the following to say on the point :

"There would appear to be an opinion pretty generally prevalent that witnesses in India are more mendacious than witnesses in other countries and it has repeatedly been stated that Judges in India have a far more difficult task to perform than Judges in England in consequence of the untruthful nature of evidence with which they have to deal. (Introduction pp. 30-31, Edn. 8)."

A somewhat similar observation was made by a Bench of the Allahabad High Court in a recent murder case of Azamgarh about which there was some controversy in the press. Taylor has attempted to give reasons for such a general prevalence of falsehood. He says :

"Thus it has been justly observed that a propensity to lying has been always more or less a peculiar feature in the character of an enslaved people—accustomed to oppression of every kind. . . . It is little to be wondered at if a lie is often resorted to as a supposed refuge from punishment and that thus an habitual disregard is engendered."

He attributes this as one of the causes of the prevalence of the disregard for truth generally in India, among the peasants of Ireland and among the subjects of Czar (Taylor Vol. I, Arts. 45 and 53, Edn. 8.) It has been suggested in many quarters that on account of the growth of modern education this tendency towards falsehood has been checked and that there is not so much of perjury now as it was before the advent of British system of justice in this country. While it has to be conceded that perjury and falsehood among the litigants and witnesses in our law Courts has been on the increase ever since the establishment of Anglo Indian Courts the proposition that its tendency has been checked due to

modern education does not seem to be warranted by the dictates of experience of those who have been dealing with that class of people days after days and years after years. The class of people who have received College or University education constitute a drop in the ocean so far as population goes and that class is seldom seen in our law Courts as parties or witnesses.

While it cannot be denied that the litigants and witnesses that come to the law Courts have deteriorated in their truth and honesty, on the contrary however I shall show on very high authorities that even up to the time of the advent of the British they were far superior to others of their class in other countries. This claim is adventurous but one that is historically well-founded. Our misconceptions about this subject are so deep-rooted and confirmed that many of us would not feel inclined to listen to such an apparently non-believable proposition. The subject is so vast that justice cannot be done to it in such a short note. I shall therefore be able to present only very faint glimpses of the same.

India had since the very dawn of human life on earth since far over six thousand years back a civilization, culture and religion whereunder Truth was God and God was Truth (Satya Narain). To them truth was not a means but the end itself and its attainment was their Salvation. Max Muller says :

"The whole of their Literature from one end to the other is pervaded by expressions of love and reverence for truth. Their very word for truth is full of meaning. It is *Sat* or *Satya* being the participle of the verb *As* which means "to be." Truth therefore was with them simply *That which is*. (Max Muller's Collected Works p. 76.)"

The whole of the Vedas are full of emphasis on this aspect of Truth. In the later epic times we find the respect for truth being carried to such an extreme that even a promise unwittingly made or made under some sort of duress was considered to be binding even at fatal consequences. The whole of the Mahabharata and the Ramayana are full of such episodes. In the Katha-Upanishad the only son of the King taunts his father for his waverings in the sacrifice of his only son in the Great Yajna that he was performing and the father sacrifices him under the greatest pangs and anguishes of his life and the son—a victim of truth—reaches the God of Death who reveals and unravels to that son the mysteries of life and death as a reward for his suffering in the cause of truth and that dialogue forms the Upanishad philosophy of the Hindus which is one of the glorious and the most elevating chapters on their philosophy of life.

1. (1849) 4 M. I. A. 431 (P. C.), *Mudhoo Soodun Sundial v. Suroop Chunder Sirkar*.

2. ('67) 11 M. I. A. 177 (P. C.), *Wise v. Sunduloonissa Chowdhranee*.

The whole plot of Ramayana is based upon a rash promise made by the King of Ayodhya who allowed himself to be perished and his most favourite son banished in the dreadful forests of Central India, for the fulfilment of that Truth. The conduct of Rama in attempting to see that his father does not falter in his duties and his faithful performance of that duty furnishes some of very rare instances of terrible sacrifices in the cause of Truth. The discourses that Rama gave to his father on that occasion form the basic conceptions of the whole Indo Aryan culture and civilization.

"The whole Royal Rule is based in its essence on Truth. On Truth the world is based. In this world the chief element in virtue is Truth. It is called the basis of everything. Truth is Lord in this world. All things are founded on Truth; nothing is higher than Truth."

The epic poem of Mahabharata is full of hundreds of episodes showing profound regard for truth and almost a slavish submission to the pledge once given. The death of Bhishma, one of the most important events in that story, is due to his vow never to hurt a woman. He is thus killed by Shikhandi whom he takes to be a woman.

Max Muller observes at one place,

"Were I to quote from all the Law Books and from still later works, everywhere you would hear the same keynote of truthfulness vibrating through them all" (p. 70).

"Let a thousand Yajnas (sacrifices) and Truth be weighed in the balance, truth will exceed the thousand sacrifices." (Mahabharata 1-8095).

That scholar further makes an emphatic declaration thus :

"I may say once more that I do not wish to represent the people of India as 253 millions of angels but I do wish it to be understood and to be accepted as a fact that the damaging charge of untruthfulness brought against that people is utterly unfounded with regard to ancient times; it is not only not true but the very opposite of the truth."

Let us now come to still later times. Ktesias the famous Greek physician of Artaxerxes (400 B. C.) the first Greek writer on India showers very high praises about the character of Indians and devotes one full chapter "On the Justice of the Indians." Megasthenes states that thefts were extremely rare in India and that Indians honoured truth and virtue. Arrian another Greek writer of second century B. C. when speaking of the works of the Public Overseers and Superintendents says, "It is against use and wont for these officers to give a false report, but indeed no Indian is accused of lying." Hiouen-thsang the famous Chinese writer speaks in the same strain in the seventh century. Idrisi a Mahomedan writer in the 11th century speaks of Indians in the following terms :

"The Indians are naturally inclined to justice and never depart from it in their actions. Their good faith, honesty and fidelity to their engagements are well known and they are so famous for these qualities that people flock to their country from every side." Morco Polo another Mahomedan writer in the thirteenth century writes :

"You must know that these Abraia-man (the Brahmans) are the best merchants in the world and the most truthful for they would not tell a lie for anything on earth."

In the 14th century Friar Jordanus goes out of his way and says : "The people of lesser India (South and Western India) are true in speech and eminent in justice." In the 15th century writers like Kamal Uddin Razzaque (a person of Samarkand an ambassador at the Court of Prince of Kalikot and of that of King of Vijayanagara) tells the same story. In the 16th century Abu Fazl the minister of Akbar writes in his Ayin-i-Akbari :

"The Hindus are religious, affable, cheerful, lovers of justice and truth, able in business, admirers of truth, grateful and of unbounded fidelity : their soldiers know not what is to fly from the field of battle." (Samual Johnson's India, p. 294.)

Let us now come to British Period of our History. Sir John Malcolm writes, "They are brave, generous, humane, and their truth is as remarkable as their courage." Professor Wilson speaking even of the ordinary labourers and mechanics working in Calcutta Mint, says "It would not be true to say that there was no dishonesty but it was comparatively rare."

One Colonel Sleeman was appointed as Commissioner for the suppression of Thuggee in India near about 1820. He travelled far and wide among villagers in villages. He has written a very valuable book "Rambles and Recollections of an Indian Official" which is full of details of lives of Indians in villages. He says that there existed a network of wonderful democratic system of village communities all over and that the real India was functioning there unaffected by the upheavals or changes of Kings and kingdoms in towns. He assures us that falsehood or lying between members of the same village was almost unknown. Speaking of one of the most savage tribes the Gonds, for instance, he maintains that nothing would induce them to tell a lie. He observes :

"In their Panchaits men adhere habitually and religiously to the truth. I have had before me hundreds of cases in which a man's property, liberty and life had depended upon his telling a lie and he had refused to tell it."

We have to bear in mind that India means village India and not town India and the certificates given by such unconcerned officers who had special means and opportunities of knowing facts have their own merits.

Warren Hastings speaks of Hindus in gene-

ral as "gentle, benevolent, more susceptible of gratitude and less prompted to vengeance than any people on the face of the earth." Bishop Heber speaks in identical terms with further additions—about the great virtues of Hindus. Elphinstone states:

"No set of people among the Hindus are so depraved as the dregs of our own great towns. The mass of crime is less in India than in England. Their freedom from gross debauchery and their superiority in purity of manners is not flattering to our self-esteem."

Sir Thomas Munro after describing in detail the wonderful systems of education, industries, and the characters of Hindus in village communities makes the following observations:

"If these elements are among the signs which denote a civilized people then the Hindus are not inferior to the nations of Europe and if civilization is to become an article of trade between England and India I am convinced that England will gain by the import cargo." (Mill's History of India Vol. 1, p. 371.)

Max Muller says:

"Let me add that I have been repeatedly told by English merchants that commercial honour stands higher in India than in any other country and that a dishonoured bill is hardly known there." (p. 63)

Colonel Sleeman has recorded an extract of the conversation that once took place between an English Judge and a native Law Officer of that time and that depicts a very accurate picture of the condition of witnesses of that time. To the Judge's query the Lawyer who had over thirty years' practice in Indian Courts stated, "First, Sir, are those who will always tell the truth whether they are required to state what they know in the form of an oath or not." Question, "Do you think that as a large class?" Answer, "Yes. I think it is; and I have found among them many whom nothing on earth could make to swerve from the truth. Do what you please you could never frighten them or bribe them into a deliberate falsehood." Speaking about the worst class of Indian witnesses of those times he says: "Three-fourths of those who do not scruple to lie in the Courts, would be ashamed to lie before their neighbours or the elders of their village."

Question.—"You think that the people of the village communities are more ashamed to tell lies before their neighbours than the people of towns?"

Answer.—"Much more—there is no comparison." He further added, "The people of towns and cities bear in India but a very small proportion to the people of the village communities."

This is the condition of Indian witnesses behaving in Courts of law about half a century of the establishment of Anglo-Indian Courts.

As against this it cannot be denied that

perjury in Indian Courts has gone on increasing and it has that increasing tendency even now. Historically the fact appears to be that after the establishment of Anglo-Indian Courts perjury started with the town and Bazar people. The honesty of the villagers remained yet untouched for a considerable time. But the impregnable traditional honesty of the villagers seems to have begun to give way in law Courts in course of time and now we have the lamentable deterioration of that class as well.

I do not know how it will strike my learned readers but to me it offers itself as a perplexing phenomenon that a race traditionally, religiously, culturally and historically honest should in the course of less than a century get itself so highly deteriorated in their virtues of truth. The causes thereof are not far to seek for those who have experiences of the workings of our modern laws and law Courts. Have we pondered over the very common expression of our present day witnesses when while speaking of facts outside Courts they every day say "I will speak the truth here and will have no hesitation in telling the whole truth for it is not a Court." And when they enter the court-room they are completely changed and will not have the slightest hesitation in telling the blackest of lies. The unravelling of this mystery will lead us to the discovery of the real causes of the fall of the moral of the Indian witnesses. They seem to feel that the Court is an alien body—a secular institution something different from themselves and their social and village environments, a place where truth can be mercilessly butchered with impunity without the least compunction. Yet we have the counter picture that these very witnesses will not easily tell a lie before even a Court arbitrator and will seldom tell a lie in a village panchait of villagers. This is certainly a complex riddle and it is for the Legislators and thinkers of our land to solve it. Perjury is eating up the very vitals of our society and blackening the fair pages of our history.

The most important part played for the demoralization of our witnesses has been that of the lawyers of the mufassil Courts and in some measure that of the mufassil Judges themselves. Our technical laws of proof of facts have equally contributed towards that cause. It is through lawyers that witnesses pass before they appear before the Judge. If they tolerate perjuries and falsehoods and actively or passively by connivance or consent allow a false witness to state false facts the doors of perjury are flung wide apart. These processes being repeated in thousands of instances every day throughout the country at

the hands of our educated Vakils will naturally make lying less odious and give it a sanction due to the position they occupy in society even to the hesitant and faltering. It is thus that the whole atmosphere of the law Courts is becoming nauseatingly intolerable. The overcrowding in the profession, the unhealthy spirit of competition, the growth of the power of the dominating influence of village barristers who can dictate terms for action and whose number has ever been increasing are all contributing towards the fall of the professional morality among our lawyers. And are not some of the Judges in the mufassils abettors of that misfeasance? Do we not often over-emphasise the number and quantity of witnesses and pay lesser attention to more vital materials which can unearth the buried truth with greater certainties, I mean elements of circumstances, conducts, general probabilities, natural permissible presumptions, documentary pieces of evidence and the demeanour and ways of the delivery and behaviours of parties and the witnesses in the Court. Do not some of us bury our heads down and go on recording statements hours after hours regardless of what passes on in front of us? Do not some of us dismiss cases because witnesses on one side are larger in number than on the other? Lawyers have to cater to the standards of Judges. And do not some of the Courts of appeals in the mufassil make similar contributions towards that cause? I am firmly of opinion that if

Judges begin to detest false evidence and exercise their statutory powers to suppress it, the legal profession will shape its ways differently. Which of us whether of the Bar or of the Bench does not feel that not even 10 per cent. of our present day witnesses make truthful contributions for finding correct facts. Yet the useless 90 per cent. will have to be put in and their conscience and those of others who are responsible for the conduct of the cases sacrificed. There has arisen a vicious circle in which every part is contributing its due share. The criminal law of perjury is for all purposes very seldom resorted to and very seldom successful. That is another cause which makes liars and perjurers bolder and more fearless.

These facts are patent enough to attract the attention of the Leaders of the Community, the people who have powers to shape the State Policy. Man does not live by bread alone. Take away the man's honesty and you reduce him to the position of a devil. Indian Society is in danger due to these increasing law Court perjuries and drastic all round measures are necessary to eradicate them. It needs the vigilance and the co-operation of all sections of people. After we have won the War this subject must form one of the most urgent and pressing items of the peace time progress. No price will be too high for it. Commissions may be set up to devise and recommend ways and means for restoring Indian honesty to its historical and traditional standard.

REVIEWS

Labour & Factory Legislation in India, by H. M. Trivedi, B.Sc., of the Middle Temple, Barrister-at-law. Published by N. M. Tripathi Ltd., Law Publishers, Princess Street, Bombay. Pages 1303. Price Rs. 15.

This book is a comprehensive compilation containing up-to-date Labour and Factories legislation. The author has divided this book into four parts. In the 1st and 2nd part the texts of Central Acts, Rules, Notifications and Bombay Acts and Rules prior to the outbreak of war have been given. The 3rd and 4th parts deal with wartime legislation. The introduction gives in brief the important provisions. The book would be appreciated by the persons concerned with administration of the law.

Defence of India Rules Series (Supplementary No. 1 to Parts I to IV) by R. R. Chhabra, B. A. The book can be had from the author, 16 Langley Road, Opposite Dev Samaj, Lahore and also from Booksellers and Publishers in Lahore, Rawalpindi, Delhi and Calcutta. Pages 118. Price Rs. 1-8-0.

We have received Supplement No. 1 to Parts I to IV. It contains amendments, additions, repeals and substitutions of Orders, Notifications and Ordinances published in previous parts together with new Orders and Notifications. It also contains amended Brass Utensils Control Order 1944, Milk (Use in Manufacture) Control Order 1944, etc. This supplement brings previous parts I to IV up till the end of December 1944. It is very useful for the Police, the Bench and the Bar.

SECTION 162, CRIMINAL PROCEDURE CODE.

by G. SRINIVASA AYYAR, B.A., *First Grade Pleader, Dindigul.*

Before the section assumed its present shape, it has had a regular eviction and the present shape was given to it by the amendment of the year 1923, after and as result of a great deal of agitation by the bar and the public. In S. 161 of the predecessor of the present Code, Act XIV of 1888, it was laid down that the witnesses examined by the police during investigation were bound to speak truly in answer to questions put to them. This was construed to mean that the statements recorded by the police were as sacred as the evidence given on oath in Courts, and when the witnesses gave statements in Courts contradictory to their so-called statements before the police it was contended that either or both the statements must be false and that both could not be true, thus justifying a prosecution on the alternative charges of giving false information to the police or giving false evidence in Court offences punishable under ss. 182 or 193, Penal Code. The absurdity of the position and the danger involved in clothing the statements said to have been made before the police with the sacredness claimed for them was realised and in the amended Code of 1898 the word 'truly' which appeared in S. 161 was removed. Now as section 162 stands, it may mean that the witnesses examined by the police are not bound to speak the truth, but if it is established that the statements were made by them and they are false, they are liable for some other offence though not for giving false evidence in the course of a judicial proceeding.

The section has been enacted with a view to benefit the accused in their defence during trial by eliciting with reference to the case-diary (embodying the statements of the witnesses examined by the police during investigation) the statements made by witnesses contradictory to their statements in Court and thus discrediting their testimony. Prior to the amendment of the year 1923, the accused were entirely at the mercy of the Courts and the police. The statements of witnesses before the police were a sealed book to them. Only when the Courts on a perusal of the statements of the witnesses agreeably to the request of the accused found contradiction to exist, the Courts might in the interests of justice direct that the accused be furnished with a copy of the statements. In the final reports of the police under S. 173, Criminal P. C., which is commonly known as 'charge sheets' there was a column in which it should be stated against each witness what points he was expected to prove. The accused were not entitled to copies of the charge sheets till after charges were framed against them. From the gist of the evidence

noted in the column relating to 'what points to prove' in the charge sheet, the defending lawyers could cull out the statements and the contradictions therein contained and then request the Courts to peruse the case-diary and satisfy themselves whether there were contradictions which should be brought out in the interests of justice. So the position reduced itself to this, that the accused should wait till charges were framed against them or permit charges to be framed against them and then after obtaining copy of the charge sheet question the witnesses about their previous statements before the police. Even then if the witnesses had the hardihood to deny the previous statements, the only course left open to the accused was to cite the police officer who recorded the statements as a defence witness and elicit through him the previous statements. It was not the habit of the police officers then, to cite the investigating officers themselves as witnesses for the prosecution in all cases. Times have changed and now in accordance with a standing order of the District Magistrate investigating officers are cited as witnesses for the prosecution in every case, and when they go into the witness box as the last witness, opportunity is given to the accused to question the officers about the contradictory statements and elicit them even before the charges are framed. If the investigating officers do not choose to cite themselves as witnesses even now the position will be the same as before.

By the amendment of the year 1923, the entire position was changed and the accused were given an absolute right to get copies of the statements of witnesses before the police during the course of the examination of witnesses for the prosecution. Whether there are contradictions or not, it was left to the accused to find out for themselves and make the best use they can of the statements themselves. The only controversy now ranges about the point of time when the accused are to call for copy of the statements. It was held in some cases decided by the Madras High Court that the accused will be entitled to call for the statements of witnesses before the police only when the examination-in-chief of the individual witness was over and when the right to cross-examine him arises: *vide* A.I.R. 1930 Mad. 185.¹ This is the practice now current. Even after the amendment of the year 1923, it was held in one or two cases that the accused should lay a foundation for belief that there were contradictions, before applying for copy of the state-

1. ('30) 17 A. I. R. 1930 Mad. 185 : 122 I. C. 463, Public Prosecutor, Madras v. Vedi.

ments of the witnesses : A. I. R. 1926 Mad. 183² and 52 Bom. 195.³ This was absurd as the police records were and are even now sealed books so far as the accused were concerned and the accused would on no account be able to lay a foundation for the belief that there were contradictions in the statements of the witnesses without looking into them, unless crooked methods are adopted by the defending counsel or they cleverly manage the situation by suggesting a contradiction: A.I.R. 1930 Mad. 185.¹ Fortunately this queer view also is gone and now the accused are given the liberty to call for the statements of the witnesses when the right to cross-examine arises : A. I. R. 1937 Mad. 822,⁴ A. I. R. 1928 Pat. 215⁵ and A.I.R. 1928 Bom. 23.³ After the amendment of the year 1923, the Inspector General of Police of this province in the police orders, in the form of the charge sheet omitted the column "what points called to prove" thus shutting out completely from the accused all clue regarding the statements made by the witnesses before the police.

Jackson J. of the Madras High Court once held that the accused might refuse to cross-examine the witnesses unless and until they were provided with copies of the statements of the witnesses before the police, that necessary arrangements must be made by the Courts to prepare the copies then and there and that an adjournment also should be given if necessary to the accused to enable them to prepare their defence after obtaining the copies. If this cumbrous procedure were to be followed the trial of cases will be protracted considerably. A practice has however grown up convenient to all concerned as a result of a tacit understanding between the practitioners and the police and the Courts. Under this practice while the accused makes his request for copies of statements in proper time, the prosecutor reads out or the Magistrate reads out the statements of the witnesses from the case-diary and the accused or their counsel note down on the spur of the moment the gist of what is read out and the cross-examination goes on without delay. This is no doubt a most unsatisfactory mode of preparing for the cross-examination of witnesses who are in most of the cases well coached up and tutored with case-diary as their guide. This practice has recently been recognised and looked on without disfavour by the

Madras High Court. The serious disadvantage involved in this procedure is that the counsel for the accused has to prepare the cross-examination then and there without previous instructions from their clients. It should also be admitted that some of the enlightened prosecutors have the kindness to put the portions of the case-diary containing the statements into the hands of the defending counsel. This obviates any lurking suspicion that some material portions of the statements have been kept back and have not been read out.

Statements recorded by Magistrates at the instance of the police under S. 164, Criminal P. C., and statements recorded by the police of witnesses examined in the course of the inquest stand practically on a par with statements under S. 162, though no conceivable reason can be found to deny copies of statements recorded under S. 164, Criminal P. C., till the commencement of the inquiry. A strict rule was observed even with regard to these statements and the accused were not furnished with copies of the statements till commencement of the enquiry in the case of statements under S. 164, and the statements under S. 176, Criminal P. C., were treated as no better than statements under S. 162, Criminal P. C. In a recent case the Madras High Court observed that there was no harm in giving copies of such statements in advance without waiting for commencement of the enquiry or waiting for the stage of cross-examination of the witnesses : 57 M. L. W. 550.⁶ It is not seen what harm is there in granting copies of the statements under S. 162, Criminal P. C., also, before the trial or inquiry begins. This view was recommended by the Lahore High Court in 30 Cr. L. J. 760.⁷ As was observed by the Calcutta and Patna High Courts in 49 C. L. J. 197⁸ and 7 Pat. 205⁵ "the accused may find it difficult to effectively cross-examine the witnesses if they (copies) are granted only after the cross-examination has begun."

While there are so many difficulties and disadvantages to which the accused are put to in their defence and in gaining an insight into the case dressed up by the police against them, and every advantage is given to the prosecution, it is surprising to find that a Deputy Inspector-General of Police of Madras Province has taken into his mind to issue a circular to be observed by all investigating officers, giving instructions as to how to evade

2. ('26) 13 A. I. R. 1926 Mad. 183 : 91 I. C. 532, In re Peramaswami Rayudu.

3. ('28) 15 A. I. R. 1928 Bom. 23 : 52 Bom. 195, Emperor v. Usman.

4. ('37) 24 A. I. R. 1937 Mad. 822 : I. L. R. (1938) Mad. 180 : 171 I. C. 962, In re Dastagir.

5. ('28) 15 A.I.R. 1928 Pat. 215 : 7 Pat. 205 : 107 I. C. 817, Ram Ghulam v. Emperor.

6. ('45) 32 A.I.R. 1945 Mad. 85: 57 M.L.W. 550, In re Muthayyan.

7. ('29) 16 A.I.R. 1929 Lah. 429: 117 I. C. 377: 30 Cr. L. J. 760, Ghulam Nabi v. Emperor.

8. ('29) 16 A.I.R. 1929 Cal. 182 : 56 Cal. 840 : 116 C. 167 : 49 C. L. J. 197, Babar Ali v. Emperor.

and circumvent the express provision of S. 162, Criminal P. C., and to completely deprive the accused of what little advantage they have under these restrictions referred to above recognised by law. The circular itself was issued 4 years ago and it also explains the reasons why it should have been issued. Section 162, Criminal P. C., is a salutary provision conceived in the interests of the accused and intended for their benefit, and the circular which is and has been followed by all investigating officers ever since is intended to take away what little benefit the accused have had till then. The circular was published in p. 330, Police Standing Orders No. 555, by the Joint Intelligence Bureau Madras and Ramnad dated 2nd July 1941 and is named 'Instructions by the D. I. G. Southern Range.' Before the circular, the Police Officers themselves evaded the provision of S. 162 sufficiently of their own accord. It was the habit of the investigating officers when questioned about the statements before them to say that no verbatim statements were taken but only a gist of them (there is a decision of the High Court in support of this : A.I.R. 1932 Cal. 375⁹) that no individual statements of witnesses were recorded but only a joint statement of more than one witness (there is also a decision in support of this : A.I.R. 1930 Lah. 457¹⁰) and hence the accused were not entitled to copies of the statements of witnesses before the Police. There was also another questionable practice prevailing before the amendment of 1923. When contradictions did exist and had to be proved only by citing the Police Officers themselves as defence witnesses, after the denial of the same by the witnesses themselves in cross-examination when their previous statements were put to them, the Police Officers themselves when questioned used to reply that they did not remember the previous statements and when further pressed to refer to the diary and give the answer, they used to say that they were not prepared to refresh their memory with reference to their diary and they could not or ought not to be compelled to refresh their memory, with reference to their own record. The situation was intolerable and the accused were helpless. Fortunately, this sort of fencing is no longer possible after the amendment of 1923.

Before the amendment of 1923, it was enjoined on all Police Officers by a Police Order that they should maintain a note-book supplied by the Department in which the

statements of witnesses examined in the course of investigation should be noted down as they were examined. Now it seems that Police Order has either been recalled or cancelled because the Police now depose that they have not recorded the statement. It is seen that the wording of S. 162 Criminal P. C. is such that it may be construed as laying no duty to record the statements of the witnesses on the Police Officers. In the main portion of S. 162, it is said "no statement made by any person in the course of investigation . . . shall if reduced to writing be signed by the person making it." It is the 'if' that has led to all the troubles and evasions. From that 'if' it is argued that the statements need not be recorded at all and the section will apply only if the statements had been recorded. The Police construe the section as meaning that they are not bound to record the statements. It is high time that the 'if' should be removed and done away with and the section itself should be amended making it compulsory on Police Officers to record the statements of the witnesses though they need not be signed by them.

Now to revert to the ingenious circular, it asks investigating officers not to record the statements of witnesses and enjoins on them to note down in the diary the impression produced on their minds as a result of the statements of witnesses heard by them in the course of investigation. The spirit in which the circular was conceived and promulgated is also seen from the circular itself. The benefits to arise from it are also laid down in the circular itself :

"It is said that (previous statement) it is not available for contradicting a witness under S. 162, Criminal P. C., and that no adjournment can be given for copies of statements as is so frequently done."

It is implied in the circular that cheap and speedy convictions could be obtained by the Police by denying to the accused the safeguards provided by law. Has the circular any moral basis to stand on? Does the D. I. G. mean to say that however untruthful and false the evidence given by a witness may be, the falsity of his evidence must pass current and the falsity of his evidence must not be exposed? Is this to be the spirit of an authority to whom the welfare and peace of the public are entrusted? Is not the spirit underlying the circular immoral in so far as it instructs ways to hoodwink the Courts into the belief that the evidence of a witness which the Police know to be false should be acted upon by the Courts? Has the D. I. G. or any officer for that matter authority to pass a legislative measure nullifying the beneficial provision of the Legislature? The benefit for which so

9. ('32) 19 A.I.R. 1932 Cal. 375 : 139 I. C. 245, Emperor v. Karimuddi.

10. ('30) 17 A.I.R. 1930. Lah. 457 : 122 I. C. 491, Benta Singh v. Emperor.

much of agitation was made is sought to be taken away from the accused by this circular. Sufficient havoc has already been done by this circular and ever so many unfortunate men have been doomed already. It is high time that this circular is withdrawn or made to be withdrawn. The legislative Department and the Law Member of the Central Government must interfere at once and throw this circular on the scrap-heap. The Legislature should at once take steps to amend the section itself making it imperative on all investigation officers to record the statements of witnesses examined by the police in the course of investigation: *vide* the observations of Nagpur High Court in A. I. R. 1945 Nag. 1.¹¹ After all what is the object of investigation by the police and the trial that follows? Both are complementary to each other. It is to find out truth and punish the offenders if the offence is made out. It must not be the object of the police to secure conviction of the persons put up for trial by them. If an unscrupulous police officer takes it into his head to concoct a case against a member of the public and with the help of hired witnesses who are prepared to perjure puts a case against that member whom he says he examined and whose statements he has not recorded for fear that they may not stick to it in trial before Courts, what is to be the fate of that member of the public if all the beneficial safeguards prescribed by law are to be ignored or denied?

The low morale of the police witnesses is very well known and that of the Police Officers is not everything desirable. If by circular legislation of the kind, the course of justice is sought to be obstructed and conviction of the accused be secured as desired by the police administration, justice will be reduced to a farce. The system of recruitment to the lower grades of the magistracy is not such as to conduce to the proper administration of criminal law and to evoke the confidence of the people in the law as administered by them. The accused have often times to go away with the idea rankling in their minds that the police have everything done in their own way in Courts. This impression must be erased from the minds of the public without any more delay as otherwise the administration of criminal justice will be brought to contempt. Another point which often arises in the course of trial of criminal cases, when it is sought to contradict a witness with reference to his previous statement before the police is this and it has given rise to an adage 'omission is no contradiction.' In one case of Madras (A. I. R.

1933 Mad. 372¹²) it has no doubt been held that omission of a particular point in the statement before the police is not a contradiction of the same when spoken to for the first time by the witness in the witness box. The mischievous effect of this view will be seen by taking a concrete instance as illustration.

As matters stand at present, the charge sheet (final report of the Police under S. 173, Criminal P. C.) gives only the names of witnesses and not a gist or purport of the statements of the witnesses themselves as it was before under the heading 'what points called to prove.' Suppose a witness was cited to prove only some circumstance not connected with the actual commission of the offence, such as 'motive.' Other witnesses are cited to prove the actual commission of the offence. These are in the language of the police 'occurrence witnesses.' They are the eye witnesses to the occurrence. Suppose they or most of them either do not support the prosecution in accordance with their statements before the police or break down in cross-examination, as the law stands at present, or as it is understood at present, the witness who was cited to prove a circumstance only may be made to give evidence as an eye witness to the occurrence. In these circumstances if the accused wish to elicit in cross-examination that the same witness did not make any mention of having witnessed the actual commission of the offence in his statement before the police, and does succeed in eliciting this omission, it may be said that this omission is no contradiction and that does not detract from the credibility of the witness. This is a very dangerous proposition of law. As an abstract proposition of law, this is absurd. Where will be safety for the accused who may be charged with a very serious offence? Even if the police officers were not required to record the statements or their gist but only their impression of the statements of the witnesses, common sense says that this all-important point would not have been omitted to be recorded by the police or that the omission itself was accidental. Are police officers entrusted with the duty of investigation devoid of all sense of importance of the facts spoken to by the witnesses examined by them with reference to the offence? Or can it be said that the omission was only a slip? Yet this is the scene which often occurs in criminal Courts. It is one thing to allow the omission to be elicited and another thing to explain it off as of no importance. The above ruling is quoted and the answer itself is blocked. I know that in a recent case the Madras High Court (57 M.L.W.

11. ('45) 32 A.I.R. 1945 Nag. 1 : I.L.R. (1945) Nag. 151, Baliram Tikaram v. Emperor.

12. ('33) 20 A.I.R. 1933 Mad. 372 : 56 Mad. 475 143 I. C. 424, Ponnuswami Chetty v. Emperor.

171¹³) watered down the rigour of this adage 'Omission is no contradiction' by saying that if the point is of such importance that no Police Officer would omit to record it, then the omission may be treated as a serious circumstance.

After all what is the harm caused to the Police or to the witnesses if the statements of witnesses examined are recorded though not in full, at least their gist or a summary of it? How will the administration of justice suffer? A decision of the Rangoon High Court 6 Rang. 672¹⁴ went even so far as to say that it is illegal to record statements only partially. If it is the fear that the witnesses would not stick up to their statements in their evidence in Courts, which seems to have prompted the above circular, the sooner it is recalled and knocked on the head, the better, for administra-

13. ('44) 31 A.I.R. 1944 Mad. 385 : I. L. R. (1944) Mad. 897 : 217 I. C. 275 : 57 M. L. W. 171, In re Guruva Vannan.

14. ('29) 16 A. I. R. 1929 Rang. 87 : 6 Rang. 672 : 115 I. C. 899, Sulaiman Mahomed Bholat v. Emperor.

tion of justice. In case the witnesses give evidence in Courts contradictory of their statements before the Police, all fair-minded Police Prosecutors who have the administration of justice at heart and are jealous about the rights of the accused, must join hands with the plodding defence counsel in exposing them as a Judge of Rangoon High Court observed that public prosecutors (A. I. R. 1933 Rang. 378¹⁵ at p. 381) as their duty must inform the accused that information of value for the defence is found in the Police papers. Similar observations occur in 42 Cal. 422.¹⁶ That must be the spirit of the Police who are responsible to the public whose safety is entrusted to their care. As it is, the spirit of the police is otherwise and that is to secure conviction of the accused at any cost by hook or by crook. That spirit must go and the administration of justice will be purified only then.

15. ('33) 20 A. I. R. 1933 Rang. 378 : 148 I.C. 810, Nga Lu v. Emperor.

16. ('15) 2 A. I. R. 1915 Cal. 545 : 42 Cal. 422 : 27 I. C. 554, Ram Ranjan Roy v. Emperor.

EXTENSION OF JURISDICTION OF THE FEDERAL COURT.

by S. K. ACHARIAR, Agent, Federal Court, Madras.

Of late, the daily newspapers, here, published that the consensus of opinion in England was against the proposed extension of jurisdiction of the Federal Court of India to hear civil appeals as notified in the Gazette of India. This may be naturally due to the anxiety to preserve the status quo ante and perpetuate the practice that has been in vogue for a long number of years. Considering the very high cost and the extreme delay which a litigant has to undergo by an appeal to the Privy Council, the sooner the appellate jurisdiction of the Federal Court is enlarged the better it would be for all concerned. One of the objects contemplated by the Government of India Act, 1935, when establishing the Federal Court, a very costly Judicial Machinery, as the highest tribunal in India, was the conferring of appellate jurisdiction on it, at no distant date, in the hope that a Federal Legislature for the whole of India, including the Indian States, would soon be established. This has not however become a *fait accompli*. It is but just and

proper that the litigants should not be made to suffer for want of it. Many a good cause loses the chance of an appeal to the Privy Council, which is now the highest Court of the land, by reason of a client's sheer inability to meet the abnormal cost thereof. As it is, the Federal Court has, by its sturdy independence and masterly judgments, given entire satisfaction to all concerned; and on enlargement of its jurisdiction a fuller Court would be quite fitted to sit upon and revise the judgments of the different High Courts in the Provinces, including Full Bench judgments. The proposed option given to appellants to prefer their appeals to the Privy Council, *direct*, would also enure to the advantage of rich individuals and of the practitioners before the Privy Council. In short, tardy and costly justice is tantamount to justice being denied. This proposed healthy amendment, which has been long overdue, has therefore to be made and given effect to by the Parliament, or otherwise, at a very early date.

ESSENTIALS OF VALID ATTACHMENT OF IMMOVABLE PROPERTY BEFORE JUDGMENT.

by SRI C. MALLIKARJUNA ROW, B.A., LL.B., ADVOCATE, Masulipatam.

The question as to the validity of attachment becomes a matter of supreme importance and vital significance deserving careful consideration, when there exists a private alienation of the property after the so-called attachment.

Section 64, Civil P. C., lays down a clause of inhibition against private alienations of the property attached. The object of the section is to prevent fraud on decree-holders and to secure intact the rights of the attaching credi-

tor against the attached property by prohibiting private alienations pending attachment. An attachment to render invalid a subsequent alienation must be made in accordance with the procedure laid down in the Code. A regularly perfected attachment is a condition precedent to such restriction or interdiction.¹ It is not the order of attachment that invalidates the alienation but an attachment which has been effectuated and completed according to the rules prescribed in the Code. An attachment operates as a valid prohibition against the alienation of the attached property only from the date on which it is completed by publication and not from the date on which the attachment is ordered by the Court.²

Thus, the essence of an order of attachment is to prohibit the judgment-debtor from transferring the property and until such a prohibition is proclaimed and made known in the way provided by the rule it cannot be said to have come into operation. Order 38 Rules 5 and 6 lay down when an attachment before judgment will be ordered by the Court. Under O. 38, R. 7, the mode of making attachment of immovable property is the same as that in execution of a decree. Order 21 Rule 54 lays down the manner in which the attachment of immovable property shall be made in execution of a decree.

The Essentials.

Under O. 21, R. 54 the following requisites are laid down, the strict fulfilment of and scrupulous compliance with which alone would complete, effectuate, and make an attachment operative. (1) Firstly, there must be an order passed by the Court prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge. (2) Secondly, the said order must be published in the following ways, namely; (a) the order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, (b) a copy of the order shall be affixed on a conspicuous part of the property, (c) a copy of the order shall be affixed upon a conspicuous part of the court house, and (d) where the property is "land paying revenue to the Government," in the office of the Collector of the District in which the land is situate. Numerous difficulties arise and intricate questions crop up when we have to consider whether an attachment has been made according to law. It becomes necessary to deal with it as it is the very basis of the execution proceedings, and the

very hub on which hinges the vital question of the title of a private alienee from the judgment-debtor. We shall consider below the several aspects concerning the strict observance of the formalities and *sine qua non* for a valid attachment.

Prohibitory order and the form to be issued :

An attachment of immovable property can only be made by means of a prohibitory order passed by the Court. Generally, the copy of the order issued to the Amin is one under O. 38, Rr. 5 and 6 of which Forms 5 to 7 of Appendix F, Civil P. C., are the specimens. These are only forms of warrant and do not contain any prohibitory orders contemplated in O. 21, R. 54. We find that most of the attachments of immovable properties before judgment are made only by publication and affixation of copies of the warrants of order issued in Forms 5 and 7 of Appendix F. This is an illegality which renders an attachment invalid. To constitute a valid attachment, a prohibitory order in the Form 24 of Appendix E to the Civil P. C., must be issued by the Court. It is as follows :

"To defendant. It is ordered that you the said, be and you are hereby prohibited and restrained, until the further order of this Court, from transferring or charging the property specified in the schedule hereunto annexed, by sale, gift or otherwise and that all persons be, and that they are hereby, prohibited from receiving the same by purchase, gift or otherwise.

Given under my hand and the seal of the Court this day of

Sd. Judge."

The prohibitory order must be passed by the Court; it is not enough for the Court to say "attach," nor can it be assumed, that since the Court said "attach" and the Amin reported "I have attached," therefore everything required to effect a valid attachment must have been done. This is the view taken by the Madras High Court in the decision of His Lordship Burn J. in (1939) 2 M. L. J. 375.³ In the absence of the prohibitory order above referred to, the very essence of attachment is gone. No doubt the appropriate form of attachment (before judgment) process to be issued is that prescribed in Form 5, Appendix F, Civil P. C. The form suggests that it primarily contemplates the attachment of moveable property because it directs the serving officer to keep the property "under safe and secure custody." But the actual attachment where the property is immovable, is to be effected in the manner provided in O. 21, R. 54 for which the proper form is prescribed in Form 24 Appendix E. Therefore, unless a prohibitory

1. ('85) 7 All. 702, Gangadin v. Khushali.

2. ('20) 7 A.I.R. 1920 Mad. 804 : 42 Mad. 844 : 53 I. C. 207 (F.B.), Sinnappan v. Arunachalam Pillai.

3. ('39) 26 A.I.R. 1939 Mad. 793 : 1939-2 M. L. J. 375, Noor Mahomed v. Pechai Ammal.

order in Form 24 Appendix E is passed by the Court and copies of the same be given to the Amin for publication and affixation as required by O. 21, R. 54, there is no valid attachment at all. This view is shared by the High Courts of Calcutta,⁴ Bombay⁵ and Patna.⁶

2. *Compliance with all requisites is necessary*:—Mere order of attachment is not enough and the said order must be published in conformity with all the formalities prescribed in O. 21, R. 54. The attachment cannot be said to be complete till all the formalities have been gone through.⁷ The preponderance of judicial opinion is to this effect:⁸

"A fasciculus of clauses beginning at R. 41 of O. 21, and applicable to 'attachment of property,' shows instance after instance that attachment is a real thing, with a variety of real applications suited to the nature of the property to be attached."

Their Lordships of the Privy Council observe: "These instances go to show that under the Civil Procedure Code in India the most anxious provisions are enacted in order to prevent a mere order of a Court from effecting attachment, and plainly indicating that the attachment itself is something separate from the mere order, and is something which is to be done and effected before attachment can be declared to have been accomplished. . . . No property can be declared to be attached unless first the order for attachment has been issued, and secondly, in execution of that order the other things prescribed by the rules in the Code have been done."⁹

Thus it is a settled proposition that unless all the processes of attachment which are required by law to effect a valid attachment have been done, there is no such attachment of the property as would invalidate its transfer under S. 64, Civil P. C.

2 (a). *Proclamation of the order by beat of drum*.—Non-compliance with this formality is a material irregularity affecting the validity of attachment.¹⁰ It is not necessary that the proclamation should be made on a

conspicuous part of the property, but it is sufficient if it is made "at some place on or adjacent to such property."

2 (b). *Affixure of a copy of the order on "a conspicuous part of the property"*.—The consensus of judicial opinion is to the effect that failure to carry out this formality invalidates the attachment, and renders it quite inoperative.¹¹ The omission to put up a copy of the order of attachment at a conspicuous part of the property to be attached is a fatal defect and vitiates the attachment and as such the aid of Section 64 cannot be evoked. The question assumes a difficult aspect when there are more than one items of property to be attached. A cloud of doubt and confusion enshrouds the interpretation of the words "the conspicuous part of the property, when several properties are sought to be attached under one proceeding or order." When several properties are attached under one order, but the order was posted only on one of them, the question whether this constitutes a valid attachment so far as the other properties are concerned, arose recently in a case decided by a Division Bench of Leach C. J., and Shahabuddin J. of the Madras High Court.¹² In this case, a copy of the order was affixed on the house and no copy of the order was affixed on any of the lands sought to be attached. The lands were in different plots and in different places. The attachment was held as invalid as far as lands were concerned. His Lordship Leach C. J. has construed the expression "the property" in the following words:

"Order 21, R. 54 (2) speaks of 'the property.' This description is manifestly inappropriate where the decree-holder has attached numerous properties situate in different places. . . . How can it be said that when an order of attachment is affixed only to one property there has been effective attachment of properties situate elsewhere? As we have indicated, in our opinion the use of the words 'the property' implies separate attachments where the application for attachment embraces several properties situate in different places."

In interpreting the same words in the old Code, the Calcutta High Court has held that 'the property' refers to each property to be attached and not to the whole in a lump.¹³ Thus, when several separate properties are attached under one proceeding or order, in

4. ('27) 14 A.I.R. 1927 Cal. 885 : 55 Cal. 545 : 104 I. C. 340, Bharat Chandra Pal v. Gouranga Chandra Pal; followed in ('37) 24 A.I.R. 1937 Cal. 375 : 173 I. C. 711 : 65 C. L. J. 329, Sitanathapathi v. v. Sarudaprasanna Das.

5. ('39) 26 A. I. R. 1939 Bom. 508 : 185 I. C. 655 : 41 Bom. L. R. 1104, Bai Hakimbu v. Dayabhai Rugnath.

6. ('39) 26 A. I. R. 1939 Pat. 81 : 182 I. C. 748, Sadhuprasad v. Satnarain Sah.

7. ('27) 14 A. I. R. 1927 Mad. 450 : 99 I. C. 989, Venkatappayya v. Venkatachalapathirao.

8. ('78) 2 All. 58, Nur Ahmad v. Altaf Ali; ('29) 16 A.I.R. 1929 All. 846 : 122 I. C. 679, Saroop Singh v. Narsingh; ('29) 16 A. I. R. 1929 Bom. 395 : 53 Bom. 851 : 123 I. C. 510, Galabhai v. Kikajivan; ('18) 5 A.I.R. 1918 Cal. 489 : 39 I. C. 562, Kannai Lal v. Ahed Bux; ('20) 7 A.I.R. 1920 Mad. 804.²

9. ('28) 15 A. I. R. 1928 P. C. 139 : 51 Mad. 349 : 55 I. A. 256 : 109 I. C. 626 (P. C.), Muthia Chetti v. Palaniappa Chetty.

10. ('86) 10 Bom. 504, Trimbak v. Nana; ('13) 40 Cal. 635 : 40 I. A. 140 : 19 I. C. 296 (P. C.), Krishnapershad v. Motichand; ('33) 20 A. I. R. 1933 All. 747 : 55 All. 182 : 147 I. C. 844, Rajendra Beharilal v. Gulzarilal.

11. ('78) 2 All 58,⁸; ('81) 7 Cal. 466, Kalytarachowdhrair v. Ramcoomar Gupta; ('20) 7 A. I. R. 1920 Lah. 24 : 60 I. C. 527, Attarsing v. Ghulam Mahomed; ('35) 22 A. I. R. 1935 Lah. 57 : 152 I. C. 630, Lachmandas v. Rupchand; ('37) 24 A. I. R. 1937 Lah. 671 : 173 I. C. 527, Derajat Bank Ltd., Deraghazikhan v. Mt. Sardar Bibi.

12. ('43) 30 A.I.R. 1943 Mad. 712 : I.L.R. (1944) Mad. 262 : 210 I. C. 197 : (1943) 2 M. L. J. 189, Rukminammal v. Rammayya.

13. ('85) 11 Cal. 74, Tripurasundari v. Durgacharanpal.

one execution case, the attachment is separate and distinct as regards each. There must be separate attachment of each property by affixture of the copy of the order on each property.

2 (c).—*Affixture of a copy of the order on a conspicuous part of court-house.*—To render an attachment valid and effective, a copy of the order of attachment must be posted upon a conspicuous part of the court house. The non-observance of this essential is fatal to the attachment.¹⁴

2 (d). *Affixture of the copy of order in the Collector's Office.*—Where the property to be attached is "land paying revenue to the Government," a copy of the order of attachment shall be affixed in the office of the Collector of the district in which the land is situate. The purpose or object of this essential is to inform the Collector of the District as to the change of ownership of the land so that he may proceed in case of default of payment of revenue, against the person who is the owner of the land. Majority of the High Courts have agreed that non-compliance with this requisite does not effectuate an attachment, and so it is invalid and inoperative.¹⁵ It has to be respectfully submitted that the only dissentient view taken by the Nagpur High Court¹⁶ is erroneous and as such cannot be followed as it militates against the view of the Privy Council.⁹ In the case of land which does not pay revenue to the Government, (i.e.) revenue free lands such as lakhiraj lands, the order of the attachment need not be affixed in the Collector's office. The words "land paying revenue to the Government" have given rise to a lot of misconception so far as the lands situate in a zamindari are concerned. The Code of Civil Procedure does not contain any definition of the word 'Revenue.' Now, 'Revenue' has been defined in S. 1, Madras Revenue Recovery Act (2 of 1864) to include cesses or other dues payable to the Provincial Government on account of water supplied for irrigation. According to S. 1, Madras City

Land Revenue (Amendment) Act (6 of 1867), "Revenue" shall mean assessment, quit-rent, ground-rent, or other charge upon the land payable to the Government. Therefore 'Revenue' means and includes whatever is payable to the Government.

In the case of land situate within a zamindari, water-cess is paid by the ryot to the Government, and the zamindar also pays revenue in the form of peishcush to the Government. In the case of shrotriam villages in the Madras Presidency, though they are subject to payment of quit-rent, still road cess is paid on the lands in such villages. The question whether in such a case, a copy of the order for attachment should be affixed in the Collector's Office, was answered in affirmative by a Division Bench of the Madras High Court¹⁷ on the ground that 'revenue' includes road and other cesses. His Lordship Devadoss J. observes at page 222 in A. I. R. 1924 Mad. 217,¹⁷

"in the Madras Regulation 24 of 1802 known as the Permanent Settlement Regulation, the words 'land revenue' are used to denote the amount payable by the zamindar to the Government. It is therefore clear that what a zamindar pays to Government is Revenue"

and at page 223 of the same decision, his Lordship says

"in other words whatever is payable to Government either by way of cess or by way of dues by a holder of land as such would be revenue."

Therefore it follows that water and road cesses also are 'revenue' paid to the Government. So even when the land to be attached is within the zamindari area, a copy of the order of attachment, should be affixed in the Collector's Office. It must be noted as a matter of caution that the usual practice in not observing this formality we find in almost a substantial majority of cases, is opposed to the requirements of law. The non-fulfilment of this condition in respect of lands other than revenue-free lands, whether they be ryotwari or zamindari renders the attachment invalid and it is of no legal efficacy for the purpose of attracting the inhibitory provisions of S. 64, Civil P. C.

From the above consideration of the mandatory provisions of O. 21, R. 54 and O. 38, Rr. 5 to 7 and the case law, it follows that the preponderance of the Judicial opinion is in favour of the view that punctilious observance of the formalities and fulfilment of the conditions above-mentioned with meticulous care is absolutely essential as an inevitable desideratum in safe-guarding the rights of the attaching decree-holder.

14. ('33) 20 A.I.R. 1933 Cal. 212 : 59 Cal. 1176 : 142 I. C. 452, Nabadwipchandra Das v. Lokenatharaj; followed in ('37) 24 A.I.R. 1937 Cal. 7 : 167 I. C. 600 : 63 C. L. J. 560, Gobinda Prosad v. Brindaban Chandra; ('39) 26 A.I.R. 1939 Lah. 284, Firm Maidatt Manek Chand v. Mt. Lachho.
15. ('85) 7 All. 731, Rai Balkishan v. Rai Sitaram; ('39) 26 A. I. R. 1939 Bom. 508 (511)⁵; ('25) 12 A. I. R. 1925 Lah. 583 : 88 I. C. 321, Ahmad Yarkhan v. S. K. Bose; ('28) 15 A. I. R. 1928 Pat. 600 : 8 Pat. 1 : 111 I. C. 797, Hiralal v. Jagapati Sahai; ('33) 20 A. I. R. 1933 Rang. 198 : 146 I. C. 693, Mg. Ohn Myaing v. Ma Mya Nyein; ('24) 11 A.I.R. 1924 Mad. 217 : 46 Mad. 736 : 75 I. C. 369, Gnanamma v. Krishna Reddi.
16. ('23) 10 A. I. R. 1923 Nag. 78 : 69 I. C. 563, Jodhan v. Kapilnath; not followed in ('37) 24 A. I. R. 1937 Cal. 7.¹⁴

17. ('24) 11 A.I.R. 1924 Mad. 217 : 46 Mad. 736.¹⁵

LAW OF LIMITATION AND THE AWARDS PASSED BY THE ARBITRATORS UNDER THE CO-OPERATIVE SOCIETIES' ACT.

by PRANVALLABHDAS H. BANATWALA, *Pleader, Jambusar.*

The general opinion of all the persons working in the Co-operative field is that the provisions of the Limitation Act, 1908, do not apply to proceeding before an arbitrator appointed under the Co-operative Societies' Act. The view that prevailed in cases of private arbitration was also the same, until the decision of the Privy Council in 31 Bom. L.R. 741.¹ Their Lordships of the Privy Council in that case laid down that although the Limitation Act, 1908, does not in terms apply to arbitration, they extend by analogy to arbitration proceeding. They further held that in the mercantile arbitration it is an implied term of the submission that the arbitrator must decide the dispute according to the existing law and that every defence (including a defence under any statute of limitation) which would have been open in a Court of law can be equally proposed for the arbitrator's decision unless the parties have agreed to exclude that defence. This pronouncement of the highest tribunal indeed carried considerable weight and the trend of judicial decisions took a turn.

It may be recalled that the English Arbitration Act, 1889 (52 & 53 Vic., C. 49) did not mention anything about the applicability of the law of Limitation to arbitration proceeding and the Indian Arbitration Act of 1899, which was enacted on the line of the English Arbitration Act, was also silent on the point; but their Lordships considered an emphatic dicta, based on English cases, raising a point of great importance and when the English Arbitration Act, 1934 (24 and 25 George V, Ch. 5) was passed, S. 16, cl (1), was inserted by which statutes of limitation were made applicable to arbitration proceeding as they applied to proceedings in Court. Similar provisions are now made by enacting S. 37, cl. (1), in the Indian Arbitration Act, 10 of 1940. The new section says that the provisions of the Limitation Act are applicable to all arbitrations under the said Act. The matter is thus settled by statute so far as it concerned the private arbitrations.

The position under the Co-operative Societies' Act was not much in controversy as the rules under the said Act provided that the arbitrator shall decide according to justice, equity and good conscience. This impliedly made the arbitrators to take the view that they are not bound by the rigid rules of the Limitation Act. This view was also shared by

the Registrar of Co-operative Societies (Bombay) and in practice awards are passed ignoring these provisions. Two of the awards passed under the Co-operative Societies' Act came in for the scrutiny of the Rangoon High Court in A.I.R. 1940 Rang. 157.² In this case a suit was filed challenging the awards principally on the ground among others that the arbitrator has passed the awards ignoring the provisions of the Limitation Act. The lower Court dismissed the suit on the ground that it had no jurisdiction to question the award. Their Lordships in appeal held that surely an arbitrator cannot be said to have decided according to justice, equity and good conscience if he has allowed himself to ignore the laws of the land applicable to the matters before him and reversed the judgment of the lower Court. They also referred to 31 Bom. L. R. 741¹ in support of their view. In the Letters Patent appeal in the said case² Roberts C. J. and Blagden J. held that the tribunal appointed under the Co-operative Societies' Act must come to a decision, which is a quasi-judicial decision or must make an award which has been arrived at after proper considerations of the case. They further said that if the allegations are that the arbitrator ignored the Limitation Act, a suit will at least lie to set aside the award on such allegations. They did not however decide the vexed question as to how far the arbitrator should consider the law of Limitation as they thought it was the matter for the trial Court to decide and dismissed the appeal : A. I. R. 1941 Rang. 104.³ In a Calcutta case reported in I.L.R. (1940) 1 Cal. 82,⁴ a ground was taken that the arbitrator under the Co-operative Societies' Act ignored the law of Limitation and therefore award was bad. The Bench of the High Court consisting of B. K. Mukherjea and Roxburgh JJ., however held that the decision of the arbitrator may be wrong in fact or in law but that is not a ground which would entitle the civil Court to interfere in the matter. These different views of the different learned Judges of the different High Courts have raised considerable doubts on the question of the applicability of the provisions of the Limitation Act to proceeding before the arbitrator under the Co-operative Societies'

2. ('40) 27 A. I. R. 1940 Rang. 157 : 189 I. C. 181, U Kyaw v. Co-operative Town Bank, Henzada.

3. ('41) 28 A. I. R. 1941 Rang. 104 : 1940 Rang. L.R. 739 : 194 I.C. 220, Co-operative Town Bank, Henzada v. U Kyaw.

4. ('40) 27 A.I.R. 1940 Cal. 193 : I. L. R. (1940) 1 Cal. 82 : 188 I.C. 213, Chatra-Serampore Co-operative Credit Society Ltd. v. Gopal Chandra.

1. ('29) 16 A.I.R. 1929 P.C. 103 : 56 Cal. 1048 : 56 I.A. 128 : 115 I.C. 713 : 31 Bom. L. R. 741(P.C.), Ram Dutt Ram Kissen v. E. D. Sasoon & Co.

Act and it is high time now that such an important matter be allowed to be kept doubtful any longer. It may be said that s. 37, Arbitration Act of 1940, does not apply to statutory arbitrations. In fact they are excluded from its operations by s. 46 of the Act. See I.L.R. (1943) 2 Cal. 431.⁵ This how-
5. (1943) 30 A. I. R. 1943 Cal. 255 : I. L. R. (1943) 2 Cal. 431 : 208 I. C. 196, Nanda Kishore v. Bally Co-operative Credit Society Ltd.

ever does not come in the way of the arbitrator if he does or does not ignore the provisions of the Limitation Act in matters before him and it is therefore, all the more necessary that suitable provisions be made in the Co-operative Societies' Act by necessary amendments to remove existing doubts on the subject at an early date.

END

THE ALL INDIA REPORTER

1945
[Vol. 32]

IMPERIAL ACTS SECTION

CONTAINING

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BY THE GOVERNOR-GENERAL

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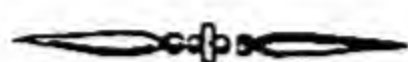
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ACT No. XII OF 1944.

Delhi Muslim Wakfs (Amendment) Act, 1944.

[Recd. G.-G.'s assent on 26th April 1944.]

An Act to amend the Delhi Muslim Wakfs Act, 1943.

WHEREAS it is expedient to amend the Delhi Muslim Wakfs Act, 1943 (XIII of 1943), for the purpose hereinafter appearing; It is hereby enacted as follows :—

Short title. 1. This Act may be called the Delhi Muslim Wakfs (Amendment) Act, 1944.

Amendment of section 25, Act XIII of 1943. 2. In sub-section (2) of section 25 of the Delhi Muslim Wakfs Act, 1943 (XIII of 1943) —

(1) after the word "Committee," where it occurs for the first time, the following shall be inserted, namely :—

"(being now a Society registered under Act XXI of 1860),"

(2) after the word "Committee," where it occurs for the second time, the following shall be inserted, namely :—

"(being now a Society registered as aforesaid),"

(3) for the words "in respect of the *masjids* and *idgahs* under its supervision" the words "in respect of wakfs in the Province" shall be substituted.

Notes.—The amendments made by this Act remove certain difficulties which arose owing to the ambiguity in the true interpretation of the Principal Act.

ACT No. XIII OF 1944.

The Protective Duties Continuation Act, 1944.

[Recd. G.-G.'s assent on 26th April 1944.]

An Act to extend the date up to which certain duties characterised as protective in the First Schedule to the Indian Tariff Act, 1934, shall have effect.

WHEREAS it is expedient to extend the date up to which certain duties characterised as protective in the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934), shall have effect; It is hereby enacted as follows:—

Notes.—The object of this Act is to maintain the *status quo* in respect of protective duties on sugar, wood-pulp paper, cotton and silk manufactures, gold and silver thread, and wire (including the so-called gold thread and wire mainly made of silver) and iron and steel manufactures for a further period of two years. The Act also extends the existing protective duty both on wheat and wheat-flour for a further period of two years in order to preserve the power to restore protection without delay should a change in the circumstances necessitate this.

Short title. 1. This Act may be called the Protective Duties Continuation Act, 1944.

2. In the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934), in Items Nos. 10 (1), 11 (1), 17, 43, 44, 44 (1), 46, 46 (1), 47, 47 (1), 47 (6), 48, 48 (1), 48 (3), 48 (4), 48 (5), 48 (7), 48 (9), 48 (10), 49 (5), 51 (2), 51 (3), 61 (5), 63 (2), 63 (3), 63 (6), 63 (9), 63 (10), 63 (12), 63 (15), 63 (17), 63 (19), 63 (20), 63 (21), 63 (25), 63 (27) and 74, for the entry or entries in the seventh column "March 31st, 1944" the entry or entries "March 31st, 1946" shall be substituted.

Amendment of section 3, Act XIII of 1932. 3. In section 3 of the Sugar Industry (Protection) Act, 1932 (XIII of 1932) for the figures "1944" the figures "1946" shall be substituted.

The Factories (Amendment) Act, 1944.

[Recd. G.-G.'s assent on 26th April 1944.]

An Act further to amend the Factories Act, 1934.

WHEREAS it is expedient further to amend the Factories Act, 1934 (XXV of 1934) for the purposes hereinafter appearing; It is hereby enacted as follows :—

Short title. 1. This Act may be called the Factories (Amendment) Act, 1944.

2. In section 9 of the Factories Act, 1934 (XXV of 1934) (hereinafter referred to as the said Act), in sub-section (1) the word "and" occurring at the end of clause (d) shall be omitted and after clause (e) the following word and clause shall be added, namely:—
"; and
(f) such other particulars as may be prescribed for the purposes of this Act."

3. In sub-section (3) of S. 19 of the said Act, the words "in which any process involving contact by the workers with injurious or obnoxious substances is carried on" shall be omitted.

4. In sub-section (1) of section 23 of the said Act, for the words "as can reasonably be required in the circumstances of each factory" the words "as may be prescribed" shall be substituted.

Notes. — "In a recent judgment of the Bombay High Court (see (43) 30 A.I.R. 1943 Bom. 5) it was held that rules to provide for means of escape were *ultra vires* in that they have reference to S. 23 of the Act for the purpose of which such rules cannot be made. Rules have however been made by Provincial Governments in this matter and it is considered that such rules are desirable. It is considered desirable that rules as hitherto made should exist. Section 23 is accordingly being suitably amended" — *Vide Notes on clauses.*

5. Until the termination of the hostilities in being at the commencement of this Act the first proviso to sub-section (1) of section 45 and the proviso to sub-section (3) of S. 54 of the said Act shall have effect as if for the figures and letters "7-30 P. M." the figures and letters "8-30 P. M." had been substituted.

ACT No. XV OF 1944.**The Indian Patents and Designs (Temporary Amendment) Act, 1944.**

[Recd. G.-G.'s assent on 22nd November 1944.]

An Act temporarily to amend the Indian Patents and Designs Act, 1911.

WHEREAS it is expedient temporarily to amend the Indian Patents and Designs Act, 1911 (II of 1911), for the purpose hereinafter appearing;

It is hereby enacted as follows :—

Notes. — The amendments made by this Act in S. 21 of the Indian Patents and Designs Act, 1911 are of a temporary nature and will remain in force only during the period beginning on 3rd September 1939 and ending on the expiry of 6 months after the cessation of the present hostilities.

1. This Act may be called the Indian Patents and Designs (Temporary Amendment) Act, 1944.

2. During the period beginning on the 3rd day of September, 1939, and ending on the expiry of six months after the cessation of the present hostilities, section 21 of the Indian Patents and Designs Act, 1911, shall have effect, and shall be deemed to have had effect throughout the said period, as if —

(a) after sub-section (3) the following sub-section had been inserted, namely:—

"(3A) The powers of officers or authorities administering any department of the service of His Majesty under sub-section (2) or sub-

section (3) to make, use or exercise an invention for the service of the Crown shall include the power to make, use, exercise or vend an invention upon such terms as are mentioned in sub-section (2) or sub-section (3) as the case may be, for any purpose which appears to any such officer or authority necessary or expedient for the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community; and the terms of any such agreement or licence as is mentioned in sub-section (2) shall be inoperative so far as concerns the making, use, exercise or vending of an invention under this sub-section as they are inoperative so far as concerns the making, use or exercise of an invention under sub-section (2)";

(b) in sub-section (4), for the words "or exercise" the words "exercise or vending" had been substituted;

(c) to sub-section (5) the following proviso had been added, namely:—

"Provided that nothing in this sub-section shall affect the right to vend an invention conferred by sub-section (3A)";

(d) after sub-section (5) the following sub-section had been inserted, namely:—

(5A) The purchaser of any article sold in pursuance of sub-section (3A) or sub-section (5)

and any person claiming through him may deal with the article in like manner as if the patent for the invention were held on behalf of His Majesty."

ACT No. XVI OF 1944.

The Coffee Market Expansion (Second) Amendment Act, 1944.

[Recd. G.-G.'s assent on 22nd November 1944.]

An Act further to amend the Coffee Market Expansion Act, 1942.

WHEREAS it is expedient further to amend the Coffee Market Expansion Act, 1942 (VII of 1942), for the purposes hereinafter appearing;

It is hereby enacted as follows:—

1. This Act may be called the Coffee Market Expansion (Second Amendment) Act, 1944.

2. To sub-section (1) of section 31 of the Coffee Market Expansion Act, 1942, the following shall be added namely:—

"and any sums transferred to the general fund under the proviso to sub-section (2) of section 32."

3. To sub-section (2) of section 32 of the

Amendment of section 32, Act VII of 1942. Coffee Market Expansion Act, 1942, the following proviso shall be added, namely:—

"Provided that where, after the requirements of the clauses of this sub-section have been met, there remains any excess in the pool fund the Board may, with the previous sanction of the Central Government, transfer the whole or any part of such excess to the credit of the general fund."

Notes.— The amendment of S. 32 provides for transfer to the general fund any excess in the pool fund after the requirements of the clauses of sub-s. (2) of that section have been met. It is proposed that the amount so transferred will be applied for promoting agricultural and technological research in the interest of the coffee industry in India.

ACT No. XVII OF 1944.

Delhi Joint Water and Sewage Board (Amendment) Act, 1944.

[Recd. G.-G.'s assent on 22nd November 1944.]

An Act further to amend the Delhi Joint Water and Sewage Board Act, 1926.

WHEREAS it is expedient further to amend the Delhi Joint Water and Sewage Board Act, 1926 (XXIII of 1926), for the purposes hereinafter appearing,

It is hereby enacted as follows:—

1. (1) This Act may be called the Delhi Joint Water and Sewage Board (Amendment) Act, 1944.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

2. In the long title and preamble of the Delhi Joint Water and Sewage Board Act, 1926 (hereinafter referred to as the said Act),—

(a) after the word "maintenance" wherever it occurs, the words "improvement and extension" shall be inserted;

(b) for the words "urban area of the city" the words "town and suburbs" shall be substituted.

3. In clause (c) of section 2 of the said Act,—

(a) the word "and" at the end of sub-clause (iii) shall be omitted;

(b) after sub-clause (iv) the following sub-clause shall be inserted, namely:—

"(v) any such local authority as the Central Government may, by notification in the official Gazette, declare to be a constituent body."

4. In the second proviso to section 11 of the said Act, the words "of the city" shall be omitted.

5. Sections 14A, 14B and 14C of the said Act shall be renumbered as sections 14C, 14D and 14E respectively, and after section 14 of the said Act but before the heading "*Disposal of sewage and payment therefor*" the following sections shall be inserted, namely:—

"14A. The Board may, with the previous sanction in writing of the Central Government, enter into an agreement with any person to supply water in bulk for consumption in an area outside the jurisdiction of any of the constituent bodies :"

Provided that the Central Government shall not accord its sanction to any such agreement unless it is satisfied that full compliance therewith can be made without prejudice to the supplies of water required to be made under section 11 :

Provided further that except in the case of a supply made for consumption in an area where the usual sources of water-supply have been injuriously affected by the Board's measures for the disposal of sewage, the charges made for water supplied under any such agreement shall not be less than one and a half times the final issue rate payable for the same period of supply by the constituent bodies.

14B. Any sums due under an agreement entered into under section 14A may, on a certificate issued by the President of the Board to the effect that the sums are due and have remained unpaid for not less than three months, be recovered by the Collector of the Delhi District from the person with whom the

Recovery of payment due otherwise than from constituent bodies.

agreement was made or from any other person who has benefited from the supply, as if they were arrears of land revenue."

6. In sub-sections (1) and (2) of section 14E of the said Act as re-numbered by section 5 of this Act, for the figures and letter "14B" the figures and letter "14D" shall be substituted.

Notes. — On the view expressed as regards the interpretation of the phrase "urban area of the City of Delhi" in the preamble and long title of the Act, the Board appears to be debarred from giving a bulk supply for consumption in any area outside the jurisdiction of the four constituent bodies mentioned in clause (c) of section 2. But for an indefinite period the residents of the Fort Notified area, though the committee in charge of this area is not a constituent body, have in fact been receiving a supply of water through the distribution system of the Delhi Municipality. Further for some years past the Board has given a free supply of piped water to certain villages in the neighbourhood of the old sewage farm at Kilokri where the drinking wells were found to have become contaminated. The present amendments to the Act regularise the position in these two particular instances and enable the Board subject to the control of the Central Government to deal with future cases in a suitable manner.

ACT No. XVIII OF 1944.

The Public Debt (Central Government) Act, 1944.

[Recd. G. G.'s assent on 22nd November 1944.]

An Act to consolidate and amend the law relating to Government securities issued by the Central Government and to the management by the Reserve Bank of India of the public debt of the Central Government.

WHEREAS it is expedient to consolidate and amend the law relating to Government securities issued by the Central Government and to the management by the Reserve Bank of India of the public debt of the Central Government;

It is hereby enacted as follows :—

Notes.—For the Statement of Objects and Reasons see Gazette of India 1943, Part V, page 162. For the bill as amended by the Select Committee see Gazette of India 1944, Part V, page 87.

1. (1) This Act may be called the Public Debt (Central Government) Act, 1944.

(2) It extends to the whole of British India.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "the Bank" means the Reserve Bank of India;

(2) "Government security" means—

(a) a security, created and issued, whether before or after the commencement of this Act, by the Central Government for the purpose

of raising a public loan, and having one of the following forms, namely :—

(i) stock transferable by registration in the books of the Bank; or

(ii) a promissory note payable to order; or

(iii) a bearer bond payable to bearer; or

(iv) a form prescribed in this behalf;

(b) any other security created and issued by the Central Government in such form and for such of the purposes of this Act as may be prescribed;

(3) "prescribed" means prescribed by rules made under this Act;

(4) "promissory note" includes a treasury bill.

3. (1) Subject to the provisions of section 5, a transfer of a Government security shall be made only in the manner prescribed for the making of transfers of securities of the class to which it belongs, and no transfer of a Government security made after the commencement of this Act shall be valid if—

(a) it does not purport to convey the full title to the security, or

(b) it is of such a nature as to affect the manner in which the security was expressed by the Central Government to be held.

(2) Nothing in this section shall affect any order made by the Bank under this Act, or any order made by a Court upon the Bank.

4. Notwithstanding anything contained in the Negotiable Instruments Act, 1881 (XXVI of 1881), a person shall not, by reason only of his having transferred a Government security, be liable to pay any money due either as principal or as interest thereunder.

5. (1) In the case of any public office to which the Central Government may, by notification in the official Gazette, declare this sub-section to apply, a Government security in the form of stock or of a promissory note may be held in the name of the office.

(2) When a Government security is so held, it shall be deemed to be transferred without any or further endorsement or transfer deed from each holder of the office to the succeeding holder of the office on and from the date on which the latter takes charge of the office.

(3) When the holder of the office transfers to a party not being his successor in office a Government security so held, the transfer shall be made by the signature of the holder of the office and the name of the office in the manner and subject to the conditions laid down in section 3.

(4) This section applies as well to an office of which there are two or more joint holders as to an office of which there is a single holder.

6. (1) No notice of any trust in respect of any Government security shall be receivable by the Central Government, nor shall the Central Government be bound by any such notice even though expressly given, nor shall the Central Government be regarded as a trustee in respect of any Government security.

(2) Without prejudice to the provisions of sub-section (1), the Bank may, as an act of grace and without any liability to the Bank or to the Central Government, record in its books such directions by the holder of stock for the payment of interest on, or of the maturity value of, or the transfer of, or such other matters relating to, the stock as the Bank thinks fit.

7. Subject to the provisions of section 9 the executors or administrators of a deceased sole holder of a Government security and the holder of a succession certificate issued under Part X of the Indian Succession Act, 1925 (XXXIX of 1925), shall be the only persons who may be

recognised by the Bank as having any title to the Government security:

Provided that nothing in this section shall bar the recognition by the Bank of the manager or the sole surviving male member of a Hindu undivided family governed by the Mitakshara Law as having a title to a Government security, when the security appears to the Bank to stand in the name of a deceased member of the family and an application is made by such manager or sole surviving member for recognition of his title and is supported by a certificate signed by such authority and after such inquiry as may be prescribed to the effect that the deceased belonged to a Hindu undivided family governed by the Mitakshara Law, that the Government security formed part of the joint property of the family, and that the applicant is the managing or sole surviving male member of the family.

Explanation. — The expression "Hindu undivided family governed by the Mitakshara Law" shall, for the purposes of this section, be deemed to include a Malabar *tarwad*.

8. Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872 (IX of 1872), —

(a) when a Government security is held by two or more persons jointly and either or any of them dies, the title to the security shall vest in the survivor or survivors of those persons, and

(b) when a Government security is payable to two or more persons severally and either or any of them dies, the security shall be payable to the survivor or survivors of those persons or to the representative of the deceased or to any of them:

Provided that nothing contained in this section shall affect any claim which any representative of a deceased person may have against the survivor or survivors under or in respect of any security to which this section applies.

Explanation. — For the purposes of this section a body incorporated under the Indian Companies Act, 1913 (VII of 1913), or the Co-operative Societies Act, 1912 (II of 1912), or any other enactment for the time being in force whether within or without British India, relating to the incorporation of associations of individuals, shall be deemed to die when it is dissolved.

9. Notwithstanding anything contained in section 7, if within six months of the death of a person who was the holder of a Government security or securities the face value of which does not

Summary procedure on death of holder of Government securities not exceeding five thousand rupees face value.

in the aggregate exceed five thousand rupees, probate of his will or letters of administration of his estate or a succession certificate issued under Part X of the Indian Succession Act, 1925 (XXXIX of 1925), is not produced to the Bank, or proof to the satisfaction of the Bank that proceedings have been instituted to obtain one of these is not furnished, the Bank may determine who is the person entitled to the security or securities, or to administer the estate of the deceased and may make an order vesting the security or securities in the person so determined.

10. When a Government security or securities belong to a minor or a person who is insane and incapable of managing his affairs and the face value of the security or securities does not in the aggregate exceed five thousand rupees, the Bank may make such order as it thinks fit for the vesting of such security or securities in such person as it considers represents the minor or insane person.

11. (1) If the person entitled to a Government security applies to the Bank alleging that the security has been lost, stolen or destroyed, or has been defaced or mutilated, the Bank may, on proof to its satisfaction of the loss, theft, destruction, defacement or mutilation of the security, subject to such conditions and on payment of such fees as may be prescribed, order the issue of a duplicate security payable to the applicant.

(2) If the person entitled to a Government security applies to the Bank to have the security converted into a security of another form, or into a security issued in connection with another loan or to have it consolidated with other like securities, or to have it sub-divided, or to have it renewed, the Bank may, subject to such conditions and on payment of such fees as may be prescribed, cancel the security and order the issue of a new security or securities.

(3) The person to whom a duplicate security or a new security is issued under this section shall be deemed for the purposes of section 19 to have been recognised by the Bank as the holder of the security; and a duplicate security or new security so issued to any person shall be deemed to constitute a new contract between the Central Government and such person and all persons deriving title thereafter through him.

12. (1) If the Bank is of opinion that a doubt exists as to the title to a Government security, it may proceed to determine the person who shall for the purposes of the Bank be deemed to be the person entitled thereto.

Summary determination by the Bank of title to Government security in case of dispute.

(2) The Bank shall give notice in writing to each claimant of whom it has knowledge, stating the names of all other claimants and the time when and the officer of the Bank by whom the determination of the Bank will be made.

(3) The Bank shall give notice in writing to each claimant of the result of the determination so made.

(4) On the expiry of six months from the issue of the notices referred to in sub-section (3), the Bank may make an order vesting in the person, found by the Bank to be entitled to the security, the security and any unpaid interest thereon.

13. Notwithstanding that as a matter of convenience the Central Government may have arranged for payments on a Government security to be made elsewhere than in British India, the rights of all persons in relation to Government securities shall be determined in connection with all such questions as are dealt with by this Act by the law and in the Courts of British India.

14. (1) For the purpose of making any order which it is empowered to make under this Act, the Bank may request a District Magistrate or in an Indian State the Political Agent to record or to have recorded the whole or any part of such evidence as any person whose evidence the Bank requires may produce. A District Magistrate so requested may himself record, or may direct any Magistrate of the first class subordinate to him or any Magistrate of the second class subordinate to him and empowered in this behalf by general or special order of the Provincial Government to record the evidence, and shall forward a copy thereof to the Bank.

(2) For the purpose of making a vesting order under this Act the Bank may direct one of its officers to record the evidence of any person whose evidence the Bank requires or may receive evidence upon affidavit.

(3) A Magistrate or an officer of the Bank acting in pursuance of this section may administer an oath to any witness examined by him.

15. Where the Bank contemplates making an order under this Act to vest a Government security in any person, the Bank may suspend payment of interest on or the maturity value of the security or postpone the making of any order under section 11 or the registration of any transfer of the security until the vesting order has been made.

16. (1) Before making any order which it is empowered to make under this Act, the Bank may require the person in whose favour the order is to be made to execute a bond with one or more sureties in such form as may be prescribed or to furnish security not exceeding twice the value of the subject-matter of the order, to be held at the disposal of the Bank, to pay to the Bank or any person to whom the Bank may assign the bond or security in furtherance of sub-section (2) the amount thereof.

(2) A Court before which a claim in respect of the subject-matter of any such order is established may order the bond or security to be assigned to the successful claimant who shall thereupon be entitled to enforce the bond or realise the security to the extent of such claim.

17. Any notice required to be given by the Bank under this Act may be served by post, but every such notice shall also be published by the Bank in the official Gazette, and on such publication shall be deemed to have been delivered to all persons for whom it is intended.

18. An order made by the Bank under this Act may confer the full title to a Government security or may confer a title only to the accrued and accruing interest on the security pending a further order vesting the full title.

19. No recognition by the Bank of a person as the holder of a Government security, and no order made by the Bank under this Act shall be called in question by any Court so far as such recognition or order affects the relations of the Central Government or the Bank with the person recognised by the Bank as the holder of a Government security or with any person claiming an interest in such security: and any such recognition by the Bank of any person or any order by the Bank vesting a Government security in any person shall operate to confer on that person a title to the security subject only to a personal liability to the rightful owner of the

security for money had and received on his account.

20. Where the Bank contemplates making with reference to any Government security any order which it is empowered to make under this Act, and before the order is made the Bank receives from a Court in British India an order to stay the making of such order, the Bank shall either—

(a) hold the security together with any interest unpaid or accruing thereon until the further orders of the Court are received, or

(b) apply to the Court to have the security transferred to the Official Trustees appointed for the Province in which such Court is situated, pending the disposal of the proceedings before the Court.

21. Where the Bank contemplates making an order under this Act vesting a Government security in any person the Bank may, at any time before the order is made, cancel any proceedings already taken for that purpose and may, on such cancellation, proceed anew to the making of such order.

22. Save as otherwise expressly provided in the terms of a Government security, no person shall be entitled to claim interest on such security in respect of any period which has elapsed after the earliest date on which demand could have been made for the payment of the amount due on such security.

23. The Central Government shall be discharged from all liability on a bearer bond or on any interest coupon of such a bond on payment to the holder of such bond or coupon on presentation on or after the date when it becomes due of the amount expressed therein, unless before such payment an order of a Court in British India has been served on the Central Government restraining it from making payment.

24. Where no shorter period of limitation is fixed by any law for the time being in force, the liability of the Central Government in respect of any interest payment due on a Government security shall terminate on the expiry of six years from the date on which the amount due by way of interest became payable.

25. No person shall be entitled to inspect, or to receive information derived from any Government security in the possession or custody

of the Central Government or from any book, register, or other document kept or maintained by or on behalf of the Central Government in relation to Government securities or any Government security, save in such circumstances and manner and subject to such conditions as may be prescribed.

26. For the purposes of section 124 of the *The Bank and its officers to be deemed public officers.* Indian Evidence Act, 1872 (I of 1872), the provisions of Part IV of the Code of Civil Procedure, 1908 (V of 1908), relating to suits by or against public officers in their official capacity, and the provisions of rule 27 of Order V, and rule 52 of Order XXI of the said Code, the Bank and any officer of the Bank acting in his capacity as such shall be deemed to be a public officer.

27. (1) If any person, for the purpose of obtaining for himself or for any other person any title to a Government security, makes to any authority under this Act in any application made under this Act or in the course of any inquiry undertaken in pursuance of this Act any statement which is false and which he either knows to be false or does not believe to be true, he shall be punishable with imprisonment for a term which may extend to six months, or with fine or with both.

(2) No Court shall take cognisance of any offence under sub-section (1) except on the complaint of the Bank.

28. (1) The Central Government may, subject to the condition of previous publication, by notification in the official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power such rules may provide for all or any of the following matters, namely:—

(a) the forms in which Government securities may be issued;

(b) the form of the obligations referred to in clause (iv) of sub-clause (a) of clause (2) of section 2;

(c) the conditions subject to which Government securities may be issued to the rulers of Indian States;

(d) the manner in which different forms of Government securities may be transferred;

(e) the holding of Government securities in the form of stock by the holders of offices other than public offices, and the manner in which and the conditions subject to which Government securities so held may be transferred;

(f) the manner in which payment of interest in respect of Government securities is to be made and acknowledged;

(g) the conditions governing the grant of duplicate, renewed, converted, consolidated and sub-divided Government securities;

(h) the fees to be paid in respect of the issue of duplicate Government securities and of the renewal, conversion, consolidation and sub-division of Government securities;

(i) the form in which receipt of a Government security delivered for discharge, renewal, conversion, consolidation or sub-division is to be acknowledged;

(j) the manner of attestation of documents relating to Government securities in the form of stock;

(k) the manner in which any document relating to a Government security or any endorsement on a promissory note issued by the Central Government may, on the demand of a person who from any cause is unable to write, be executed on his behalf;

(l) the form of the bonds referred to in sub-section (1) of section 16;

(m) the circumstance and the manner in which and the conditions subject to which inspection of Government securities, books, registers and other documents may be allowed or information therefrom may be given under section 25;

(n) the procedure to be followed in making vesting orders;

(o) the authority by whom the certificate referred to in the proviso to section 7 is to be granted and the manner of making the inquiry therein mentioned.

(3) A copy of all rules under this section shall be laid on the table of both the Chambers of the Indian Legislature as soon as may be after they are made.

29. The Indian Securities Act, 1920 (X of Act X of 1920 not to apply to Government securities. 1920), shall cease to apply to Government securities to which this Act applies, and to all matters for which provision is made by this Act.

THE
ALL INDIA REPORTER
1945
IMPERIAL ACTS SECTION

ACT No. I OF 1945.

The Indian Tea Control (Amendment) Act, 1945.

[Recd. G.G.'s assent on 27th March 1945.]

An Act further to amend the Indian Tea Control Act, 1938.

WHEREAS it is expedient further to amend the Indian Tea Control Act, 1938 (VIII of 1938), for the purposes hereinafter appearing;

It is hereby enacted as follows :

1. This Act may be called the Indian Tea Control (Amendment) Act, 1945.
Short title.

Amendment of Schedule, Act VIII of 1938. 2. In the Schedule to the Indian Tea Control Act, 1938, in paragraph 1—

(a) for the proviso to clause (a), the following proviso shall be substituted, namely :—

“Provided that any allowance made in respect of young areas which has already been included in determining the cardinal crop basis of the estate shall be deducted”;

(b) for the proviso to clause (b), the following proviso shall be substituted, namely :—

“Provided that any allowance made in respect of low producing areas which has already been included in determining the cardinal crop basis of the estate shall be deducted.”

Notes.—For the Statement of Objects and Reasons for making the amendments see Gazette of India Extra Ordinary, 1945, page 59.

ACT No. II OF 1945.

The Code of Criminal Procedure (Amendment) Act, 1945.

[Recd. G. G.'s assent on 29th March 1945.]

An Act further to amend the Code of Criminal Procedure, 1898, for certain purposes.

WHEREAS it is expedient further to amend the Code of Criminal Procedure, 1898 (V of 1898), for the purposes hereinafter appearing; It is hereby enacted as follows :—

1. This Act may be called the Code of Criminal Procedure (Amendment), Act, 1945.
Short title.

2. To section 161 of the Code of Criminal Procedure, 1898 (V of 1898), the following sub-section shall be added, namely :—

“(8) The police-officer may reduce into writing any statement made to him in the course of an examination under this section, and if he does so he shall make a separate

record of the statement, of each such person whose statement he records.”

Notes.—The effect of the amendment is to abolish the practice of recording joint statements which are incapable of use as the statement of any individual witness.

3. After sub-section (2) of section 426 of the said Code, the following sub-section shall be inserted, namely :—

“(2A) When any person other than a person accused of a non-bailable offence is sentenced to imprisonment by a Court, and an appeal lies from that sentence, the Court may, if the convicted person satisfies the Court that he intends to present an appeal, order that he be released on bail for a period sufficient in

the opinion of the Court to enable him to present the appeal and obtain the orders of the Appellate Court under sub-section (1) and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended."

Notes.—Before the present amendment of S. 426 persons convicted of bailable offences and desiring to appeal against the conviction got bail from the

appellate Courts but had to undergo considerable amount of trouble and expense before the order granting bail was obtained. In many cases they had actually to pass some days in prison before they could get the desired order. The newly added sub-section (2A) removes this hardship by empowering the Court convicting a person of a bailable offence to release him on bail for the period requisite to enable him, in case where an appeal lies, to make his application to the appellate Court.

The Indian Finance Act, 1945

An Act to give effect to the financial proposals of the Central Government for the year beginning on the 1st day of April, 1945.

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, British India, to fix maximum rates of postage under the Indian Post Office Act, 1898 (VI of 1898), to continue for a further period of one year the additional duties of customs imposed by section 6 of the Indian Finance Act, 1942 (XII of 1942) and to modify certain of those duties, to alter the duty of customs and the duty of excise on tobacco, to fix rates of income-tax and super-tax, and to continue the charge and levy of excess profits tax;

It is hereby enacted as follows :—

NOTES :—The object of this Act is to continue the existing rate of salt duty; to increase the inland postal rate on parcels exceeding 40 tolas in weight; to continue the additional duty of customs imposed by S. 6 of the Indian Finance Act, 1942 and increase certain of these duties; to alter the duty of excise on tobacco in certain respects; to give relief from income-tax to earned income and to make a change in the existing rate of surcharge on income-tax and to continue the excess profits tax.—*Vide* Statement of Objects and Reasons.

Short title and extent. 1. (1) This Act may be called the Indian Finance Act, 1945.

(2) It extends to the whole of British India.

2. The duty on salt manufactured in, or imported by land into British India shall, for the year beginning on the 1st day of April, 1945, be at the rate of one rupee and nine annas per standard maund.

3. For the year beginning on the 1st day of April, 1945, the Schedule contained in the First Schedule to this Act shall be inserted in the Indian Post Office Act, 1898 (VI of 1898), as the First Schedule to that Act.

4. (1) The additional duties of customs on certain goods chargeable with a duty of customs under the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934), or under the said Schedule read with any notifi-

cation of the Central Government for the time being in force, imposed up to the 31st day of March, 1943, by section 6 of the Indian Finance Act, 1942 (XII of 1942), and continued, subject to certain modifications, up to the 31st day of March, 1945, by section 4 of the Indian Finance Act, 1944, shall continue to be levied and collected as provided in section 6 of the Indian Finance Act, 1942 (XII of 1942), up to the 31st day of March, 1946, subject to the modifications contained in sub-section (2).

(2) The additional duty to be levied and collected under the foregoing sub-section shall be one-half instead of one-fifth of the amount of the duty of customs specified in the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934), in the case of spirits, comprised in Item No. 22 (4) and in sub-items (a), (c) and (d) of Item No. 22 (5) of the said Schedule; and no such additional duty shall be levied or collected on tobacco comprised in Items Nos. 24, 24 (1), 24 (2) and 24 (3) of the said Schedule.

Alteration of duty of customs on tobacco. 5. In the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934),—

(a) in Item No. 24, for the entry in the fourth column the entry "Rs. 8 per lb." shall be substituted;

(b) in Item No. 24 (1), for the entry in the fourth column the following shall be substituted, namely :—

"The rate at which duty is for the time being leviable on articles included in Item No. 87 of this Schedule under this Act read with any other enactment in force, plus Rs. 7-8-0 per lb." ;

(c) in Item No. 24 (2), for the entry in the fourth column the following shall be substituted, namely :—

"The rate at which duty is for the time being leviable on articles included in Item No. 87 of this Schedule under this Act read with any other enactment in force plus Rs. 18-12-0 per thousand or Rs. 7-8-0 per lb. whichever is higher." ;

(d) in Item No. 24 (3), for the entries in the fourth and sixth columns, respectively, the entries "Rs. 7-8-0 per lb." and "Rs. 7 per lb." shall be substituted.

Alteration of duty of excise on tobacco. 6. In the First Schedule to the Central Excises and Salt Act, 1944

(I of 1944), in Item No. 9, under the heading "I. Unmanufactured tobacco",—

(a) for the entries (i), (ii) and (iii) contained in sub-item (1) beginning—

"(1) if flue-cured and intended for—

(a) manufacture into cigarettes containing—"
the following shall be substituted, namely:—
Per lb.

"(i) more than 60 per cent. weight of imported tobacco... Seven rupees and eight annas.

(ii) more than 40 per cent. but not more than 60 per cent. weight of imported tobacco ... Five rupees.

(iii) more than 20 per cent. but not more than 40 per cent. weight of imported tobacco ... Three rupees and eight annas.

(iv) 20 per cent. or less than 20 per cent. weight of imported tobacco ... Two rupees and eight annas.

(v) no imported tobacco ... One rupee";
and in the second column of clause (b) of that sub-item, for the words "Three rupees and eight annas" the words "Seven rupees and eight annas" shall be substituted;

(b) in sub-item (4), the word "stems" shall be omitted.

Income-tax and super-tax. 7. (1) Subject to the provisions of sub-sections (3), (4) and (5),—

(a) income-tax for the year beginning on the 1st day of April, 1945, shall be charged at the rates specified in Part I of the Second Schedule increased in each case by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of income-tax, and

(b) rates of super-tax for the year beginning on the 1st day of April, 1945, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922 (XI of 1922), be those specified in Part II of the Second Schedule increased in the cases to which paragraphs A, B and C of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of super-tax.

(2) If any provision is made in the Indian Income-tax Act, 1922 (XI of 1922), for the exemption from income-tax of a portion of the earned income included in the total income of an assessee, then, in making any assessment for the year ending on the 31st day of March, 1946, there shall be deducted from the total

income of an assessee in accordance with such provision an amount equal to one-tenth of such earned income exclusive of any income chargeable under the head "Salaries" but not exceeding in any case two thousand rupees.

(3) In making any assessment for the year ending on the 31st day of March 1946, where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49B of the Indian Income-tax Act, 1922 (XI of 1922), to have paid income-tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1944, on his total income the same proportion as the amount of such inclusions bears to his total income.

(4) In making any assessment for the year ending on the 31st day of March, 1946,—

(a) where the total income of a company includes any profits and gains from life insurance business, the super-tax payable by the company on that part of its total income which consists of such inclusion shall be at the rate of six pies in the rupee;

(b) where the total income of an assessee, not being a company, includes any profits and gains from life insurance business, the income-tax and super-tax payable by the assessee on that part of his total income which consists of such inclusion shall be an amount bearing to the total amount of such taxes payable according to the rates applicable under the operation of the Indian Finance Act, 1942 (XII of 1942), on his total income the same proportion as the amount of such inclusion bears to his total income, so, however, that if the aggregate of the taxes so computed in respect of such inclusion exceeds the aggregate of the taxes on the same income payable by a company under the operation of the Indian Finance Act, 1942 (XII of 1942), the taxes payable on such inclusion shall be computed at the rates applicable to a company under the operation of the said Act.

(5) In cases to which section 17 of the Indian Income-tax Act, 1922 (XI of 1922), applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (1) of this section, and in accordance with the provisions of sub-sections (3) and (4) of this section where applicable.

(6) For the purposes of this section and of the rates of tax imposed thereby, the expres-

sion "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922 (XI of 1922); and the expression "earned income" means earned income as defined for the purposes of the said Act.

(7) Where the total income of an assessee referred to in paragraph A of Part I of the Second Schedule does not exceed six thousand rupees, an amount representing one rupee for every complete unit of two hundred rupees of his total income as reduced by the income, if any, exempt from tax under any provision of the Indian Income-tax Act, 1922 (XI of 1922), or any notification issued thereunder shall be funded for the assessee's benefit and shall be paid to him on such date not more than twelve months after the termination of the present hostilities, as the Central Government may fix :

Provided that the amount to be funded for the assessee's benefit shall in no case exceed two-fifths of the tax payable by him.

Explanation.—In computing the amount to be funded under this sub-section if there is an incomplete unit amounting to one hundred rupees or more it shall be reckoned as a complete unit of two hundred rupees.

(8) Notwithstanding anything contained in sub-section (7) of section 6 of the Indian Finance Act, 1944, the amount to be funded for the assessee's benefit under the provisions of that sub-section shall in no case exceed two-fifths of the amount of tax payable by him in respect of his assessment for the year ending on the 31st day of March, 1945.

(9) The provisions of section 23A of the Indian Income-tax Act, 1922 (XI of 1922), shall not apply in respect of profits and gains of the previous year for the assessment for the year ending on the 31st day of March, 1946.

8. (1) In sub-clause (a) of clause (6) of section 2 of the Excess Profits Tax Act, 1940 (XV of 1940), for the words and figures "31st day of March, 1945," the words and figures "31st day of March, 1946," shall be substituted.

(2) The excess profits tax imposed by section 4 of the Excess Profits Tax Act, 1940 (XV of 1940) shall, in respect of any chargeable accounting period beginning after the 31st day of March, 1945, be an amount equal to sixty-six and two-thirds per cent. of the amount by which the profits of the business during that chargeable accounting period exceed the standard profits.

THE FIRST SCHEDULE

Schedule to be inserted in the Indian Post Office Act, 1898.

(See section 3)

"THE FIRST SCHEDULE

INLAND POSTAGE RATES

(See section 7)

Letters

For a weight not exceeding one tola	One and a half annas.
For every tola, or fraction thereof exceeding one tola	One anna.

Postcards

Single	Nine pies.
Reply	One and a half annas.

Book, Pattern and Sample Packets

For the first five tolas or fraction thereof	Nine pies.
For every additional two and a half tolas, or fraction thereof, in excess of five tolas	Three pies.

Registered Newspapers

For a weight not exceeding ten tolas	Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas.	Half an anna.
For every twenty tolas, or fraction thereof exceeding twenty tolas.	Half an anna.
In the case of more than one copy of the same issue of a registered newspaper being carried in the same packet—	
For a weight not exceeding ten tolas	Half an anna.
For every additional five tolas, or fraction thereof, in excess of ten tolas	Quarter of an anna.
Provided that such packet shall not be delivered at any addressee's residence but shall be given to a recognised agent at the post office.	

Parcels

For a weight not exceeding forty tolas	Six annas.
For every forty tolas, or fraction thereof, exceeding forty tolas	Six annas."

THE SECOND SCHEDULE

(See section 7)

PART I*Rates of Income-tax*

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons not being a case to which paragraph B of this Part applies : —

	Rate	Surcharge
1. On the first Rs. 1,500 of total income . . .	Nil.	Nil.
2. On the next Rs. 3,500 of total income . . .	Nine pies in the rupee.	Six pies in the rupee.
3. On the next Rs. 5,000 of total income . . .	One anna and three pies in the rupee.	Ten pies in the rupee.
4. On the next Rs. 5,000 of total income . . .	Two annas in the rupee.	One anna and six pies in the rupee.
5. On the balance of total income . . .	Two annas and six pies in the rupee.	Two annas and three pies in the rupee :

Provided that —

(i) no income-tax shall be payable on a total income which, before deduction of the allowance, if any, for earned income, does not exceed Rs. 2000 ;

(ii) the income-tax payable shall in no case exceed half the amount by which the total income (before deduction of the said allowance, if any, for earned income) exceeds Rs. 2,000 ;

(iii) the income-tax payable on the total income

as reduced by the allowance for earned income shall not exceed either —

(a) a sum bearing to half the amount by which the total income (before deduction of the allowance for earned income) exceeds Rs. 2,000 the same proportion as such reduced total income bears to the unreduced total income, or

(b) the income-tax payable on the income so reduced at the rates specified in this Schedule, whichever is less.

B. — In the case of every company and local authority, and in every case in which under the provisions of the Indian Income-tax Act, 1922, income-tax is to be charged at the maximum rate —

	Rate	Surcharge
On the whole of total income . . .	Two annas and six pies in the rupee.	Two annas and three pies in the rupee.

PART II*Rates of Super-tax*

A. — In the case of every individual, Hindu undivided family, unregistered firm and other association of persons, not being a case to which paragraphs B and C of this Part apply —

	Rate	Surcharge
1. On the first Rs. 25,000 of total income . . .	Nil.	Nil.
2. On the next Rs. 10,000 of total income . . .	One anna in the rupee.	One anna in the rupee.
3. On the next Rs. 20,000 of total income . . .	Two annas in the rupee.	Two annas in the rupee.
4. On the next Rs. 70,000 of total income . . .	Three annas in the rupee.	Two annas and six pies in the rupee.
5. On the next Rs. 75,000 of total income . . .	Four annas in the rupee.	Three annas in the rupee.
6. On the next Rs. 1,50,000 of total income . . .	Five annas in the rupee.	Three annas in the rupee.
7. On the next Rs. 1,50,000 of total income . . .	Six annas in the rupee.	Three annas in the rupee.
8. On the balance of total income . . .	Seven annas in the rupee.	Three annas and six pies in the rupee.

B.—In the case of every local authority —

C.—In the case of an association of persons being a co-operative society, other than the Sanikatta Salt-owners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies —

	Rate	Surcharge
1. On the first Rs. 25,000 of total income . . .	Nil.	Nil.
2. On the balance of total income . . .	One anna in the rupee.	One anna in the rupee.

D.—In the case of every company —

	Rate
On the whole of total income . . .	Three annas in the rupee :

Provided that a rebate of one anna in the rupee shall be allowed on the total income as reduced by the amount of any dividend declared in British India in respect of the whole or part of the previous year for the assessment for the year ending on the 31st day of March, 1946, not being a dividend payable at a fixed rate.

Explanation. — For the purposes of this proviso, the expression 'dividend' shall be deemed to include any distribution included in the expression 'dividend' as defined in clause (6A) of section 2 of the Indian Income-tax Act, 1922, and any such distribution made during the year ending on the 31st day of March, 1946, shall be deemed to have been made in respect of the whole or part of the previous year.

This Bill has been consented to by the Council of State.

M. B. DADABHOY,
President, Council of State.

The 29th March, 1945.

I assent to this Bill.

JOHN COLVILLE,
Viceroy and Acting Governor-General.

The 29th March, 1945.

This Act has been made by me as Governor-General under the provisions of section 67B of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935.

JOHN COLVILLE,
Viceroy and Acting Governor-General.

The 29th March, 1945.

WHEREAS I, John Colville, am of opinion that a state of emergency exists which justifies the direction by me that the Indian Finance Act, 1945, being an Act made by me under the provisions of section 67B of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, shall come into operation forthwith :

Now, THEREFORE, in exercise of the power conferred by the proviso to sub-section (2) of that section, I do hereby direct accordingly.

JOHN COLVILLE,
Viceroy and Acting Governor-General.

The 29th March, 1945.

ACT No. III OF 1945.

The Factories (Amendment) Act, 1945.

[Recd. G.G.'s assent on 16th April, 1945.]

An Act further to amend the Factories Act, 1934.

WHEREAS it is expedient further to amend the Factories Act, 1934 (XXV of 1934), for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

Short title and commencement.
ment) Act, 1945.

1. (1) This Act may be called the Factories (Amendment) Act, 1945.

(2) It shall come into force on the 1st day of January, 1946.

2. After section 35 of the Factories Act, 1934 (XXV of 1934) (hereinafter referred to as the said Act), the following section shall be inserted, namely :—

“35A. *Compensatory holidays.*—(1) Where, as a result of the passing of an order or the making of a rule under the provisions of this Act exempting a factory or the workers therein from the provisions of section 35, a worker is deprived of any of the weekly holidays for which provision is made by sub-section (1) of that section, he shall be allowed, as soon as circumstances permit, compensatory holidays of equal number to the holidays so lost.

(2) The Provincial Government may make rules prescribing the manner in which the holidays, for which provision is made in sub-section (1), shall be allowed.”

Insertion of new Chapter IVA in Act XXV of 1934.
inserted namely :—

3. After Chapter IV of the said Act the following Chapter shall be

“CHAPTER IVA HOLIDAYS WITH PAY

49A. *Application of Chapter.*—(1) The provisions of this Chapter shall not apply to a seasonal factory.

(2) The provisions of this Chapter shall not operate to the prejudice of any rights to which a worker may be entitled under any other enactment, or under the terms of any award, agreement or contract of service.

49B. *Annual holidays.*—(1) Every worker who has completed a period of twelve months continuous service in a factory shall be allowed, during the subsequent period of twelve months, holidays for a period of ten or, if a child, fourteen consecutive days, inclusive of the day or days, if any, on which he is entitled to a holiday under sub-section (1) of section 35.

(2) If a worker fails in any one such period of twelve months to take the whole of the holidays allowed to him under sub-section (1), any holidays not taken by him shall be added to the holidays to be allowed to him under sub-section (1) in the succeeding period of twelve months, so however that the total number of days holidays which may be carried

forward to a succeeding period shall not exceed ten or, in the case of a child, fourteen.

(3) If a worker entitled to holidays under sub-section (1) is discharged by his employer before he has been allowed the holidays, or if, having applied for and having been refused the holidays, he quits his employment before he has been allowed the holidays, the employer shall pay him the amount payable under section 49C in respect of the holidays.

Explanation. — A worker shall be deemed to have completed a period of twelve months continuous service in a factory notwithstanding any interruption in service during those twelve months brought about by sickness, accident or authorised leave not exceeding ninety days in the aggregate for all three, or by a lock-out, or by a strike which is not an illegal strike, or by intermittent periods of involuntary unemployment not exceeding thirty days in the aggregate; and authorised leave shall be deemed not to include any weekly holiday allowed under section 35 which occurs at the beginning or end of an interruption brought about by the leave.

49C. *Pay during annual holidays.* — Without prejudice to the conditions governing the day or days, if any, on which the worker is entitled to a holiday under sub-section (1) of section 35, the worker shall, for the remaining days of the holidays allowed to him under section 49B, be paid at a rate equivalent to the daily average of his wages as defined in the Payment of Wages Act, 1936 (IV of 1936), for the days on which he actually worked during the preceding three months, exclusive of any earnings in respect of overtime.

49D. *Payment when to be made.* — A worker who has been allowed holidays under section 49B shall, before his holidays begin, be paid half the total pay due for the period of holidays.

49E. *Power of Inspector to act for worker.* — Any Inspector may institute proceed-

ings on behalf of any worker to recover any sum required to be paid under this Chapter by an employer which the employer has not paid.

49F. *Power to make rules.*—(1) The Provincial Government may make rules to carry into effect the provisions of this Chapter.

(2) Without prejudice to the generality of the foregoing power rules may be made under this section prescribing the keeping by employers of registers showing such particulars as may be prescribed and requiring such registers to be made available for examination by Inspectors.

(3) The Central Government may give directions to a Province as to the carrying into execution of the provisions of this section.

49G. *Exemption of factories from provisions of this Chapter.* — Where the Provincial Government is satisfied that the leave rules applicable to workers in a factory provide benefits substantially similar to those for which this Chapter makes provision, it may, by written order, exempt the factory from the provisions of this Chapter."

Amendment of section 60, Act XXV of 1934. 4. In section 60 of the said Act,—

(a) at the end of clause (f), the word "or" shall be added;

(b) after clause (f) as so amended, the following clause shall be inserted, namely :—

"(g) there is any contravention of section 49B, 49C or 49D, or of any rule made under section 49F,".

5. In section 61 of the said Act, for the brackets and letter "(f)", the brackets and letter "(g)" shall be substituted.

Notes.—For the Statement of Objects and Reasons see the original bill published on page 75 of Part V of the Gazette of India, 1944. The Report of the Select Committee is given on page 47 of Part V of the Gazette of India, 1945.

ACT No. IV OF 1945.

The Indian Companies (Amendment) Act, 1945.

[Recd. G. G.'s assent on 16th April 1945.]

An Act further to amend the Indian Companies Act, 1913.

WHEREAS it is expedient further to amend the Indian Companies Act, 1913 (VII of 1913), for the purpose hereinafter appearing ;

It is hereby enacted as follows :—

1. This Act may be called the Indian Companies (Amendment) Act, 1945.

Short title,

2. To section 282B of the Indian Companies Act, 1913, the following sub-section shall be added, namely :—

Amendment of section 282B, Act VII of 1913.

"(6) Nothing in sub-section (2) shall affect any rights of an employee under the rules of a provident fund to obtain advances from or to withdraw money standing to his credit in the fund, where the fund is a recognized provident fund within the meaning of clause (a) of section 58A of the Indian Income-tax Act, 1922 (XI of 1922), or, the rules of the fund contain provisions corresponding to rules 4, 5, 6, 7, 8 and 9 of the Indian Income-tax (Provident Funds Relief) Rules."

Notes. — Certain Registrars of Joint Stock Companies took the view that sub-section (2) of section 282B precluded the withdrawal, by an employee of the money standing to his credit. This view,

which is not only contrary to the intention but is destructive of the normal operation of all provident funds maintained by companies, is now displaced by the addition of sub-section (6) to section 282B.

ACT No. V OF 1945.

The Indian Merchandise Marks (Amendment) Supplementary Act, 1945.

[Recd. G. G.'s assent on 16th April 1945.]

An Act to amend the Indian Merchandise Marks (Amendment) Act, 1941.

WHEREAS it is expedient to amend the Indian Merchandise Marks (Amendment) Act, 1941, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

1. This Act may be called the Indian Merchandise Marks (Amendment) Supplementary Act, 1945.

2. In section 7 of the Indian Merchandise Marks (Amendment) Act, 1941 (hereinafter referred to as the said Act), in the new section substituted by the said section for section 12 of the Indian Merchandise Marks Act, 1889 (IV of 1889),—

(a) in sub-section (2),

(i) for the words "cotton sewing or darning thread" the words "cotton thread namely sewing, darning, crochet or handicraft thread" shall be substituted;

(ii) for the words and figures "in premises which are a factory, as defined in the Factories Act, 1934," the words and figures "in any premises not exempted by rules made under section 20 of this Act" shall be substituted;

(iii) for the words and figures "any rules made under section 20 of this Act" the words "the said rules" shall be substituted;

(iv) for the words "marked with the weight of thread in the unit" the words "marked with the length or weight of thread in the unit" shall be substituted;

(v) for the words "the grist number" the words "in such other manner as may be required by the said rules" shall be substituted;

(vi) for the words "from the factory" the words "from the premises" shall be substituted;

(vii) the following proviso shall be added, namely:—

"Provided that the rules made under section 20 shall exempt all premises where the work is done by the members of one family with or without the assistance of not more than ten other employees, and all premises controlled by a co-operative society where

not more than twenty workers are employed in the premises."

(b) in sub-section (3), for the words "or any cotton sewing or darning thread" the words "or any such thread" shall be substituted.

3. For section 9 of the said Act, the following section shall be substituted, namely:—

"9. *Amendment of section 20, Act IV of 1889.* — In section 20 of the said Act, after sub-section (1) the following sub-section shall be inserted, namely:—

"(1A) The Central Government may make rules providing for the manner in which for the purposes of section 12 cotton yarn and cotton thread shall be marked with the particulars required by that section, and for the exemption of certain premises used for the manufacture, bleaching, dyeing or finishing of cotton yarn or cotton thread from the provisions of that section."

4. In section 10 of the said Act, in clause (c), in the new clause (j) added to section 18 of the Sea Customs Act, 1878 (VIII of 1878),—

(a) for the words "cotton sewing or darning thread" the words "cotton sewing, darning, crochet or handicraft thread" shall be substituted;

(b) in sub-clause (ii) for the words "an indication of the weight" the words "the length or weight" and for the words "the grist number in accordance with" the words "in such other manner as is required by" shall be substituted;

(c) in sub-clause (iv) for the words and figures "a factory as defined in the Factories Act, 1934," the words, brackets and figures "premises not exempted from the operation of sub-section (2) of section 12 of the Indian Merchandise Marks Act, 1889 (IV of 1889)," shall be substituted.

Notes.—For the Statement of Objects and Reasons for making the amendments in the Indian Merchandise Marks Act, 1941, see Gazette of India Extraordinary dated 1st February 1945.

The Repealing and Amending Act, 1945.

[Recd. G. G.'s assent on 16th April 1945.]

An Act to repeal certain enactments and to amend certain other enactments.

WHEREAS it is expedient that the enactments specified in the First Schedule which are spent or have otherwise become unnecessary, or have ceased to be in force otherwise than by expressed specific repeal, should be expressly and specifically repealed;

AND WHEREAS it is expedient that certain amendments should be made in the enactments specified in the Second Schedule;

It is hereby enacted as follows :—

Notes. — The object of this Act is to remove from the statute book certain Acts, Regulations and Ordinances or portions of them which have either ceased to have effect or ceased to be in force. It also corrects small errors detected in the Acts, Regulations and Ordinances included in the Second Schedule. Section 4 of this Act contains the usual precautionary provisions.

1. This Act may be called the Repealing and Amending Act, 1945.

2. The enactments specified in the First Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

3. The enactments specified in the Second Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

4. The repeal by this Act of any enactment shall not affect any Act or Regulation in which such enactment has been applied, incorporated or referred to;

and this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing;

nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed;

nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force.

THE FIRST SCHEDULE**REPEALS**

(See section 2)

Year 1	No. 2	Short Title 3	Extent of repeal 4
<i>Acts of the Central Legislature</i>			
1934	XXVIII	The Indian Rubber Control Act, 1934	The whole.
1939	XXIV	The Indian Census Act, 1939	The whole.
1940	I	The Registration (Emergency Powers) Act, 1940.	Section 7.
1940	IV	The Offences on Ships and Aircraft Act, 1940.	The whole.
1940	VI	The Indian Coinage (Amendment) Act, 1940.	The whole.
1940	VIII	The Indian Emigration (Amendment) Act, 1940.	The whole.
1940	IX	The Reserve Bank of India (Amendment) Act, 1940.	The whole.
1940	X	The Arbitration Act, 1940	Section 49 and the Third and Fourth Schedules.
1940	XI	The Coal Mines Safety (Stowing) Amendment Act, 1940.	The whole.
1940	XII	The Income-tax Law Amendment Act, 1940.	Sections 2, 3, 4, 5, 6, 7, 8 and 10.
1940	XIII	The Reserve Bank of India (Second Amendment) Act 1940.	The whole.
1940	XIV	The Parsi Marriage and Divorce (Amendment) Act, 1940.	The whole.

Year 1	No. 2	Short Title 3	Extent of repeal 4
1940	XVI	The Indian Finance Act, 1940.	In the long Title and Preamble, the words commencing with "to fix the duty on salt" and ending "Indian Post Office Act, 1898, and". Sections 2, 3, 4, 5 and 6 and Schedule I.
1940	XVII	The Factories (Amendment) Act, 1940.	The whole.
1940	XIX	The Defence of India (Amendment) Act, 1940.	The whole.
1940	XX	The Insurance (Amendment) Act, 1940.	The whole.
1940	XXI	The Indian Tariff (Amendment) Act, 1940.	The whole.
1940	XXII	The Indian Tariff (Second Amendment) Act, 1940.	The whole.
1940	XXIV	The Indian Mines (Amendment) Act, 1940.	The whole.
1940	XXV	The Petroleum (Amendment) Act, 1940.	The whole.
1940	XXVI	The Motor Vehicles (Amendment) Act, 1940.	The whole.
1940	XXVIII	The Indian Works of Defence (Amendment) Act, 1940.	The whole.
1940	XXIX	The Indian Navy (Discipline) Amendment Act, 1940.	The whole.
1940	XXX	The Indian Navy (Discipline) Second Amendment Act, 1940.	The whole.
1940	XXXI	The Cantonments (Amendment) Act, 1940.	The whole.
1940	XXXII	The Repealing and Amending Act, 1940.	The whole.
1940	XXXIII	The Indian Registration (Amendment) Act, 1940.	The whole.
1940	XXXIV	The Code of Civil Procedure (Amendment) Act, 1940.	The whole.
1940	XXXV	The Code of Criminal Procedure (Amendment) Act, 1940.	The whole.
1940	XXXVI	The Indian Companies (Amendment) Act, 1940.	The whole.
1940	XXXVIII	The Reserve Bank of India (Third Amendment) Act, 1940.	The whole.
1940	XXXIX	The Motor Spirit (Duties) Amendment Act, 1940.	The whole.
1940	XL	The Indian Income-tax (Amendment) Act, 1940.	Sections 2, 4, 5, 6, 7, 8, 9, 10, 11 12 and 13.
1940	XLI	The Indian Sale of Goods (Amendment) Act, 1940.	The whole.
1940	XLII	The Excess Profits Tax (Amendment) Act, 1940.	The whole.
1941	III	The Petroleum (Amendment) Act, 1941.	The whole.
1941	VI	The Indian Railways (Amendment) Act, 1941.	The whole.
1941	VII	The Indian Finance Act, 1941.	In the long Title and Preamble the words commencing with "to fix the duty on salt" and ending "Indian Post Office Act, 1898". Sections 2, 3, 4, 5 and 6 and the Schedule.
1941	VIII	The Protective Duties (Continuation) Act, 1941.	The whole.
1941	IX	The Indian Tariff (Amendment) Act, 1941.	The whole.
1941	XI	The Excess Profits Tax (Amendment) Act, 1941.	The whole.
1941	XIII	The Insurance (Amendment) Act, 1941.	The whole.
1941	XIV	The Code of Criminal Procedure (Amendment) Act, 1941.	The whole.
1941	XV	The Code of Criminal Procedure (Second Amendment) Act, 1941.	The whole.
1941	XVI	The Factories (Amendment) Act, 1941.	The whole.
1941	XVII	The Aligarh Muslim University (Amendment) Act, 1941.	The whole.
1941	XVIII	The Madras Port Trust (Amendment) Act, 1941.	The whole.
1941	XXI	The Federal Court Act, 1941.	Section 2.
1941	XXVI	The Indian Companies (Amendment) Act, 1941.	The whole.
1941	XXVII	The Trade Marks (Amendment) Act, 1941.	The whole.

Year 1	No. 2	Short Title 3	Extent of repeal 4
<i>Act of the Governor-General</i>			
1940	...	The Indian Finance (No. 2) Act, 1940.	In the long Title and Preamble the words and figures, "to alter the maximum rates of postage under the Indian Post Office Act, 1898", Section 2.
<i>Regulations made by the Governor-General</i>			
1940	I	The British Baluchistan Bazars (Amendment) Regulation, 1940.	The whole.
1940	II	The British Baluchistan Laws (First Amendment) Regulation, 1940.	The whole.
1940	III	The British Baluchistan Arms Regulation, 1940.	Section 3.
1940	VI	The British Baluchistan Laws (Second Amendment) Regulation, 1940.	The whole.
1940	IX	The British Baluchistan Laws (Third Amendment) Regulation, 1940.	The whole.
1940	XII	The British Baluchistan Laws (Fourth Amendment) Regulation, 1940.	The whole.
1940	XIII	The British Baluchistan Laws (Fifth Amendment) Regulation, 1940.	The whole.
1941	I	The British Baluchistan Laws (First Amendment) Regulation, 1941.	The whole.
1941	III	The Andaman and Nicobar Islands (Amendment) Regulation, 1941.	The whole.
1941	VI	The British Baluchistan Laws (Second Amendment) Regulation, 1941.	The whole.
1941	VII	The British Baluchistan Laws (Third Amendment) Regulation, 1941.	The whole.
<i>Ordinances made by the Governor-General under section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935.</i>			
1940	III	The Payment of Wages (Amendment) Ordinance, 1940.	The whole.
1940	IV	The Currency Ordinance, 1940.	Section 3.
1940	V	The National Service (European British Subjects) Amendment Ordinance, 1940.	The whole.
1940	VI	The Indian Coinage (Amendment) Ordinance, 1940.	The whole.
1940	VII	The Indian Tea Control (Amendment) Ordinance, 1940.	The whole.
1940	XI	The National Service (Technical Personnel) Amendment Ordinance, 1940.	The whole.
1940	XII	The Indian Coinage (Second Amendment) Ordinance, 1940.	The whole.
1940	XIV	The Indian Coinage (Third Amendment) Ordinance, 1940.	The whole.
1941	II	The Civic Guards (Amendment) Ordinance, 1941.	The whole.
1941	III	The Reserve Bank of India (Amendment) Ordinance, 1941.	The whole.
1941	VI	The National Service (European British Subjects) Amendment Ordinance, 1941.	The whole.
1941	IX	The Indian Navy (Discipline) Amendment Ordinance, 1941.	The whole.
1941	XII	The War Risks (Goods) Insurance Amendment Ordinance, 1941.	The whole.

THE SECOND SCHEDULE
AMENDMENTS
(See section 3)

Year 1	No. 2	Short Title 3	Amendments 4
1856	XX	The Bengal Chaukidari Act, 1856.	In sections 21, 36, 38 and 59 of the Act, in its application to Ajmer-Merwara, for the word "Commissioner," wherever it occurs, the words "Deputy Commissioner" shall be substituted.

Year 1	No. 2	Short Title 3	Amendments 4
1878	XVII	The Northern India Ferries Act, 1878.	In the Act as applicable to Ajmer-Merwara— (a) in section 4 for the words "the Commissioner of the Division in which such ferry is situate" the words "the Deputy Commissioner" shall be substituted. (b) in sections 8 and 11 for the word "Commissioner" the words "Deputy Commissioner" shall be substituted. (c) in section 12 for the words "the Commissioner of a division" the words "the Deputy Commissioner" shall be substituted, the words "within such division" in clause (a) shall be omitted, and for the word "Commissioner" where it occurs for the second and third time the words "Deputy Commissioner" shall be substituted. (d) in sections 15, 16, 19, 24 and 31, for the words "the Commissioner of the division" the words "the Deputy Commissioner" shall be substituted. (e) in section 35 for the words "any Commissioner of a division or Magistrate" the words "the Deputy Commissioner or a Magistrate" shall be substituted.
1879	XIV	The Hackney Carriage Act, 1879.	In sections 3 and 5 of the Act, in its application to Ajmer-Merwara, for the word "Commissioner" wherever it occurs, the words "Deputy Commissioner" shall be substituted.
1880	XIII	The Vaccination Act, 1880.	In sections 8 and 19 of the Act, in its application to Ajmer-Merwara for the word "Commissioner" wherever it occurs, the words "Deputy Commissioner" shall be substituted.
1890	IX	The Indian Railways Act, 1890.	(a) In sub-section (4) of section 113, for the words "any Magistrate of the first or second class," the words "any Presidency Magistrate or Magistrate of the first or second class" shall be substituted. (b) In section 138, for the words "any Magistrate of the first class" the words "any Presidency Magistrate or Magistrate of the first class" shall be substituted.
1898	V	The Code of Criminal Procedure, 1898.	In section 415, for the words "by which any two or more of the punishments therein mentioned are combined" the words "by which any punishment therein mentioned is combined with any other punishment" shall be substituted.
1911	VIII	The Indian Army Act, 1911.	In section 10, for the words "and if within the said three months such person claims his discharge any such irregularity or illegality or other ground shall not, until such person is discharged" the words "and if any person, in receipt of military pay and borne on the rolls as aforesaid, claims his discharge before the expiry of three months from his enrolment no such irregularity or illegality or other ground shall, until he is discharged" shall be substituted.
1913	VII	The Indian Companies Act, 1913.	(a) In sub-section (3) of section 131A, for the word, brackets and figure "Sub-section (3)" the word, brackets and figure "sub-section (4)" shall be substituted. (b) In sub-section (3) of section 151, for the word brackets and figure "sub-section (1)" the word, brackets and figure "sub-section (2)" shall be substituted.
1932	XIV	The Indian Air Force Act, 1932.	In section 10, for the words "and if within the said three months such person claims his discharge any such irregularity or illegality or other ground shall not, until such person is discharged" the words "and if any person, in receipt of air force pay and borne on the rolls as aforesaid, claims his discharge before the expiry of three months from his enrolment no such irregularity or illegality or other ground shall, until he is discharged" shall be substituted.

Year 1	No. 2	Short Title 3	Amendments 4
1934	XXXII	The Indian Tariff Act, 1934.	In the First Schedule, item 10 (2) shall be omitted.
1939	IV	The Motor Vehicles Act, 1939.	In sub-section (2) of section 28 the words, brackets and figure "Sub-section (1) of" shall be omitted.
1940	XV	The Excess Profits Tax Act, 1940.	In the Second Schedule in sub-rule (1) of rule 3, for the words "the last preceding rule" the words and figure "rule 2 of this Schedule" shall be substituted.
1944	I	The Central Excises and Salt Act, 1944.	In section 39, for the words "Second Schedule" the words "Third Schedule" shall be substituted. In the First Schedule in item 1, for the words, figures and brackets "Indian Petroleum Act, 1899 (VIII of 1899)" the words, figures and brackets "Petroleum Act, 1934 (XXX of 1934)" shall be substituted.
1944	X	The Indian Coconut Committee Act, 1944.	In clause (c) of section 2, for the words, figures and brackets "Indian Factories Act, 1934 (XXV of 1934)" the words, figures and brackets "Factories Act, 1934 (XXV of 1934)" shall be substituted.
<i>Regulations made by the Governor General in Council</i>			
1872	IV	The Ajmere Talukdars Relief Regulation, 1872.	(a) In section 1, for the words "Commissioner" means the Commissioner of Ajmere" the words "Deputy Commissioner" means the Deputy Commissioner of Ajmere Merwara" shall be substituted. (b) In sections 2, 4, 6, 7, 8, 9, 10, 12, 13, 14, 15, 18, 19, 20, 22, 23, 26, 27, 28, 29, 30 and 31 for the expressions "the Commissioner" and "the Commissioner's" respectively wherever they occur the expressions "the Deputy Commissioner" and "the Deputy Commissioner's" shall be substituted.
1874	VI	The Ajmere Forest Regulation, 1874.	(a) In section 2 for the words "the Commissioner" the words "the Conservator of Forests" shall be substituted. (b) In section 5 for the words "the Commissioner of Ajmere" the words "the Conservator of Forests" shall be substituted. (c) In section 6 for the words "the said Commissioner" the words "the Conservator of Forests" shall be substituted. (d) In section 8 for the words "with the Commissioner's sanction" the words "with the sanction of the Conservator of Forests" shall be substituted. (e) In section 11 for the words "the Commissioner of Ajmere" the words "the Conservator of Forests", and for the words "the said Commissioner" the words "the Conservator of Forests" shall be substituted.
1877	II	The Ajmere Land and Revenue Regulation, 1877.	In sections 2, 25, 35, 52, 114, 115 and 116, for the expression "the Commissioner", wherever it occurs, the expression "the Deputy Commissioner" shall be substituted. In section 31, for the words "by the Commissioner with the sanction of the Governor-General in Council" the following shall be substituted namely : "with the sanction of the Governor-General in Council, by the Commissioner if granted prior to the 1st day of January, 1943 or by the Deputy Commissioner if granted thereafter."
1886	VI	The Ajmere Rural Boards Regulation, 1886.	In sections 14, 18, 19, 21 and 22, for the expression "the Commissioner" wherever it occurs, the expression "the Deputy Commissioner" shall be substituted.
1888	I	The Ajmere Government Wards Regulation, 1888.	In section 4, for the words "the Commissioner" the words "the Deputy Commissioner" shall be substituted.
1911	II	The Ajmere Talukdars Loan Regulation, 1911.	In sections 3, 5, 6, 8, 10, 11, 12, 15 and 18, for the expression "the Commissioner" wherever it occurs, the expression "the Deputy Commissioner" shall be substituted.

Year 1	No. 2	Short Title 3	Amendments 4
1925	VI	The Ajmer-Merwara Municipalities Regulation, 1925.	(a) In sections 3, 4, 10, 19, 22, 27, 28, 34, 36, 38, 57, 61, 64, 77, 93, 125, 139, 198, 225, 237, 238, 239, 240, 241, 242, 244 and 247, for the expression "the Commissioner", wherever it occurs, the expression "the Deputy Commissioner" shall be substituted. (b) In the heading to Chapter XIII, for the word "Commissioner" the words "Deputy Commissioner" shall be substituted.
1926	IX	The Ajmer Courts Regulation, 1926.	In sections 4, 5 and 28, for the expression "the Commissioner", wherever it occurs, the expression "the Deputy Commissioner" shall be substituted.
<i>Ordinances made by the Governor-General under section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935.</i>			
1944	XXXVIII	The Criminal Law Amendment Ordinance, 1944.	In section 1, after sub-section (2) the following sub-section shall be inserted and shall be deemed always to have been inserted, namely :— “(3) It shall come into force at once.”
1944	LVI	The Cotton Textiles Fund (Second Amendment) Ordinance, 1944.	In clause (a) of section 2, for the words "after the word 'exported'," the words "after the word 'Exported' where it first occurs" shall be substituted.

ACT No. VII OF 1945.

The Indian Army (Amendment) Act, 1945.

[Recd. G.-G.'s assent on 16th April 1945.]

An Act further to amend the Indian Army Act, 1911.

WHEREAS it is expedient further to amend the Indian Army Act, 1911 (VIII of 1911), for the purposes hereinafter appearing ;

It is hereby enacted as follows : —

1. This Act may be called the Indian Army (Amendment) Act, 1945.

Amendment of section 114, Act VIII of 1911. 2. In section 114 of the Indian Army Act, 1911,

(a) after rule (6), the following rules shall be inserted, namely :—

“(7) Where the deceased person or deserter is an Indian commissioned officer on active service, the references in the foregoing rules to the commanding officer shall be construed as references to the Standing Committee of Adjustment, if any, appointed in this behalf in the manner prescribed; and the power conferred by rule (2) to require payment of a deposit left in a Government savings bank shall be read as a power to require the payment from any deposit left in any bank, notwithstanding anything in the rules of the bank, of a sum, not exceeding two thousand rupees, equal to the nearest multiple of one hundred rupees above the amount estimated by the Standing Committee of Adjustment as necessary to meet the regimental and other debts in camp or quarters of the deceased.

(8) The decision of the commanding officer or the Standing Committee of Adjustment, as the case may be, as to what are the regimental and other debts in camp or quarters

of a deceased person and as to the amount payable therefor shall, subject to the result of any appeal as against an order to the principal Court of original civil jurisdiction in the locality, be final.”;

(b) the existing *Explanation* shall be numbered *Explanation 1* and the following *Explanation* shall be added, namely :—

“*Explanation 2.* — The expression ‘regimental and other debts in camp or quarters’ includes for the purposes of this section money due as —

military debts, namely, sums due in respect of, or of any advance in respect of —

(a) quarters,

(b) mess, band, and other regimental accounts,

(c) military clothing, appointments and equipments, not exceeding a sum equal to six months’ pay of the deceased, and having become due within eighteen months before his death.”

Notes. — Under the procedure in force before this amending Act was passed the disposal of moveable property in camp or quarters of Indian Commissioned Officers dying or deserting while on active service devolved upon the Commanding Officer. In conditions as they existed upto now the Commanding Officer was normally engaged with operational commitments and his unit was often on the move. He was therefore unable to devote adequate time and attention to the disposal of property. The amendment of S. 114 now ensures speedy disposal of property by setting up an expert body — a Standing Committee of Adjustment, to deal with the matter.

The Indian Air Force (Amendment) Act, 1945.

[Recd. G.G.'s assent on 16th April 1945.]

An Act further to amend the Indian Air Force Act, 1932.

WHEREAS it is expedient further to amend the Indian Air Force Act, 1932 (XIV of 1932), for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

1. This Act may be called the Indian Air Force (Amendment) Act, 1945.

Short title.

Amendment of section 126, Act XIV of 1932.

2. In section 126 of the Indian Air Force Act, 1932,—

(a) after rule (6), the following rules shall be inserted, namely :—

“(7) In the case of a person dying or deserting while on active service, the references in the foregoing rules to the commanding officer shall be construed as references to the Standing Committee of Adjustment, if any, appointed in this behalf in the manner prescribed ; and the power conferred by rule (2) to require payment of a deposit left in a Government savings bank shall be read as a power to require the payment from any deposit left in any bank, notwithstanding anything in the rules of the bank, of a sum, not exceeding one thousand five hundred rupees, equal to the nearest multiple of one hundred rupees above the amount estimated by the Standing Committee of Adjustment as necessary to meet the service and other debts in camp or quarters of the deceased.

(8) The decision of the commanding officer or the Standing Committee of Adjustment, as the case may be, as to what are the service and other debts in camp or quarters of a deceased person and as to the amount payable therefor shall, without prejudice to any jurisdiction otherwise exercisable by a court of law, be final.”;

(b) the existing *Explanation* shall be numbered *Explanation 1* and the following *Explanation* shall be added, namely :—

“*Explanation 2.*—The expression ‘service and other debts in camp or quarters’ includes for the purposes of this section money due as—

air force debts, namely, sums due in respect of, or of any advance in respect of—

(a) quarters,

(b) mess, band, and other service accounts,

(c) air force clothing, appointments and equipments, not exceeding a sum equal to six months’ pay of the deceased, and having become due within eighteen months before his death.”

Notes.—The amendment of S. 126 of the Indian Air Force Act is made on the same lines as the amendment of S. 114 of the Indian Army Act by Act No. VII of 1945, and has the same object of ensuring speedy disposal of moveable property in camp or quarters of personnel of the Royal Indian Air Force dying or deserting while on active service.

ACT No. IX OF 1945.**The Indian Patents and Designs (Amendment) Act, 1945.**

[Recd. G.G.'s assent on 16th April 1945.]

An Act further to amend the Indian Patents and Designs Act, 1911.

WHEREAS it is expedient further to amend the Indian Patents and Designs Act, 1911 (II of 1911), for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

1. This Act may be called the Indian Patents and Designs (Amendment) Act, 1945.

Short title.

2. In section 3 of the Indian Patents and Designs Act, 1911 (hereinafter referred to as the said Act), in sub-section

(3), for the words “a specification”, the words “either a provisional or complete specification” shall be substituted.

Substitution of new section 4 for section 4, Act II of 1911.

3. For section 4 of the said Act, the following section shall be substituted, namely, —

“4. *Specifications.* — (1) A provisional specification must describe the nature of the invention.

(2) A complete specification must particularly describe and ascertain the nature of the invention and the manner in which the same is to be performed.

(3) A specification, whether provisional or complete, must commence with the title, and in the case of a complete specification must end with a distinct statement, of the invention claimed.

(4) Where the Controller deems it desirable, he may require that suitable drawings shall be supplied at any time before the acceptance of the application, and such drawings shall be deemed to form part of the complete specification.

(5) If in any particular case the Controller considers that an application should be further supplemented by a model or sample of anything illustrating the invention or alleged to constitute an invention, such model or sample as he may require shall be furnished before the acceptance of the application, but such model or sample shall not be deemed to form part of the specification.

(6) The Controller may, where the application was accompanied by a specification purporting to be a complete specification, if the applicant so requests, treat the specification as a provisional specification and proceed with the application accordingly."

Insertion of new sections 4-A and 4-B, Act II of 1911. 4. After section 4 of the said Act, the following sections shall be inserted, namely, —

"4-A. *Time for leaving complete specification.*—(1) If the applicant does not leave a complete specification with his application, he may leave it at any subsequent time within nine months from the date of the application:

Provided that the said nine months shall be extended to such period, not exceeding ten months from the date of the application, as may be specified in a request made by the applicant to the Controller, if the request is made and the prescribed fee is paid within the period so specified.

(2) If the complete specification is not left within the period allowable under sub-section (1), the application shall be deemed to be abandoned at the expiration of ten months from the date thereof.

4-B. *Provisional protection.*—(1) An invention may, during the period between the date of an application for a patent therefor and the date of sealing a patent on that application, be used and published without prejudice to that patent, and such protection from the consequences of use and publication is in this Act referred to as provisional protection.

(2) In this section, the expression "date of an application for a patent" means, as respects an application which is post-dated or ante-dated under this Act, the date to which the application is so post-dated or ante-dated, and means, as respects any other application, the date on which it is actually made."

Amendment of section 5, Act II of 1911. 5. In section 5 of the said Act —

(a) in sub-section (1),

(i) for the words "The Controller shall refer every application to an Examiner", the words "The Controller shall refer to an Examiner every application in respect of which a complete specification has been filed" shall be substituted;

(ii) for clause (a) the following clause shall be substituted, namely, —

"(a) the nature of the invention or the manner in which it is to be performed is not particularly described and ascertained in the complete specification, or";

(iii) after clause (d) the following clause shall be inserted, namely, —

"(dd) where a complete specification has been left after a provisional specification, the invention particularly described in the complete specification is not substantially the same as that which is described in the provisional specification, or";

(iv) after the existing proviso the following proviso shall be inserted, namely, —

"Provided further that where a complete specification is left after a provisional specification, the Controller may, if the applicant so requests, cancel the provisional specification and direct that the application shall be deemed to have been made on the date on which the complete specification was left, and proceed with the application accordingly";

(b) in sub-section (4) and the proviso thereto, for the words "twelve months" wherever they occur, the words "eighteen months" shall be substituted.

Amendment of section 6, Act II of 1911. 6. In section 6 of the said Act, for the word "specification" the word "specifications" shall be substituted.

Substitution of new section for section 7, Act II of 1911. 7. For section 7 of the said Act the following section shall be substituted, namely, —

"7. *Effect of acceptance of application.*—After the acceptance of an application and until the date of sealing a patent in respect thereof, or the expiration of the time for sealing, the applicant shall have the like privileges and rights as if a patent for the invention had been sealed on the date of the acceptance of the application:

Provided that the applicant shall not be entitled to institute any proceedings for infringement until the patent has been sealed."

Amendment of section 9, Act II of 1911. 8. In sub-section (1) of section 9 of the said Act, —

(a) in clause (c) for the word "specification" the word "specifications" shall be substituted;

(b) to clause (d) the word "or" shall be added and after that clause the following clause shall be added, namely, —

"(e) that the complete specification describes or claims an invention other than that described in the provisional specification, and that such other invention either forms the subject of an application made by the oppo-

ment for a patent which if granted would bear a date in the interval between the date of the application and the leaving of the complete specification, or has been made available to the public by publication in any document published in British India in that interval."

Amendment of section 10, Act II of 1911. **9.** In sub-section (2) of section 10 of the said Act,—

(a) for the words "eighteen months" wherever they occur in the section including the proviso the words "twenty-four months" shall be substituted;

(b) to clause (c) of the proviso the words "or at such later time as the Controller may think fit" shall be added.

Insertion of new section 13-A, Act II of 1911. **10.** After section 13 of the said Act, the following section shall be inserted, namely,—

"13-A. *Single patent for cognate inventions.*—(1) Where the same applicant has put in two or more provisional specifications for inventions which are cognate or modifications one of the other, and has obtained thereby concurrent provisional protection for the same, and the Controller is of opinion that the whole of such inventions are such as to constitute a single invention and may properly be included in one patent, he may allow one complete specification in respect of the whole of such applications and grant a single patent thereon.

(2) Such patent shall bear the date of the earliest of such applications, but in considering the validity of the same, and in determining other questions under this Act, the Court or the Controller, as the case may be, shall have regard to the respective dates of the provisional specifications relating to the several matters claimed in the complete specification."

Amendment of section 26, Act II of 1911. **11.** In sub-section (1) of section 26 of the said Act,—

(a) in clause (g) and clause (h) for the word "specification" the words "complete specification" shall be substituted,

(b) in clause (1) for the word "specification" where it occurs for the first time the words "complete specification" shall be substituted;

(c) after clause (m) the following clause shall be inserted, namely,—

"(n) that the invention claimed in the complete specification is not the same as that contained in the provisional specification, and that the invention claimed, so far as it is not contained in the provisional specification, was not new at the date when the complete specification was filed.";

1945 Acts/3a (4 pages.)

(d) in the proviso to the sub-section in clause (ii) for the words, brackets and figures "sub-section (2) of section 21" the words, brackets and figures and letter "sub-section (12) of section 21A" shall be substituted.

Insertion of new section 38-A, Act II of 1911. **12.** After section 38 of the said Act, the following section shall be inserted, namely,—

"38-A. *Disconformity.*—A patent shall not be held to be invalid on the ground that the complete specification claims a further or different invention to that contained in the provisional, if the invention therein claimed; so far as it is not contained in the provisional, was novel at the date when the complete specification was put in, and the applicant for the patent was the true and first inventor thereof, or the legal representative or assign of such inventor."

Amendment of section 61, Act II of 1911. **13.** In sub-section (1) of section 61 of the said Act, for the words "become void" the words "deemed to have been refused" shall be substituted.

Amendment of section 78-A, Act II of 1911. **14.** In sub-section (3) of section 78-A of the said Act, for the existing proviso the following proviso shall be substituted, namely,—

"Provided that, in the case of a patent,—

(a) the application shall be accompanied by a complete specification; and

(b) if the application is not accepted within eighteen months from the date of the application for protection in the United Kingdom, the specification shall, with the drawings (if any) supplied therewith, be open to public inspection at the expiration of that period."

Amendment of Schedule to Act II of 1911. **15.** In the Schedule to the said Act,—

(a) for the entry
"On application for a patent ... 10"
the following entries shall be substituted, namely,—

"On application for a patent accompanied by provisional specification... 10

On filing complete specification after provisional specification ... 20

On application for a patent accompanied by complete specification ... 30"

(b) for the entry
"Before sealing a patent ... 30"

the following entry shall be substituted, namely,—

"For sealing a patent ... 30"

Notes.—Unlike the U. K. Patents and Designs Act, 1907, the Indian Patents and Designs Act did not permit an inventor to apply for a patent before he had worked out the practical details of his invention thereby exposing him to the risks arising from the disclosure of his invention to others at its unprotected stage. The amendments to the various

sections of the Indian Act on the lines of the U. K. Act (made by the present Act) now confer on the applicant an option to file with his application a "provisional" specification merely describing "the

nature of the invention" and later within a specific period to follow it up with the "complete" specification describing both "the nature of the invention" and "the manner of performing the same."

ACT No. X OF 1945.

The Mines Maternity Benefit (Amendment) Act, 1945.

[Recd. G.-G.'s assent on 16th April 1945.]

An Act further to amend the Mines Maternity Benefit Act, 1941.

WHEREAS it is expedient further to amend the Mines Maternity Benefit Act, 1941 (XIX of 1941), for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

1. This Act may be called the Mines Maternity Benefit (Amendment) Act, 1945.

2. Section 3 of the Mines Maternity Benefit Act, 1941 (hereinafter referred to as the said Act), shall be re-numbered as sub-section (1) of that section and to the section as so renumbered the following sub-section shall be added, namely :—

"(2) No owner or manager of a mine shall employ any woman below ground in the mine —

(a) if he has reason to believe or if she has informed him that she is likely to be delivered of a child within ten weeks ;

(b) if she has to the knowledge of the management been delivered of a child within the preceding twenty-six weeks ;

(c) during the period of ten weeks following the twenty-six weeks referred to in clause (b) —

(i) for more than four hours in a day unless a *creche* is provided at the mine ;

(ii) in any case, for more than four hours at any one time :

Provided that where the woman informs the management that the child of which she was delivered has died, the provisions of clause (c) shall not apply after the management has with due diligence verified the correctness of her statement."

3. In section 4 of the said Act,—

(a) in the proviso to sub-section (1), after the words "Provided that" the words "except in the case of a woman employed below ground in the mine" shall be inserted ;

(b) for sub-section (2) the following sub-sections shall be substituted namely :—

"(2) If any woman employed below ground in a mine gives notice either orally or in writing in the prescribed form to the manager of the mine that she expects to be delivered

of a child within ten weeks from the date of such notice, the manager may, on undertaking to defray the cost of such examination, require the woman to be examined within three days by a qualified medical practitioner or midwife, and shall permit her if she so desires to absent herself from work in any capacity in the mine prior to the said examination, and unless he obtains a certificate that the woman is not pregnant or not likely to be delivered of a child within ten weeks or the woman refuses to submit to such examination, up to the day of her delivery, and such absence shall be treated as a period of authorised absence on leave.

(3) The examination referred to in the proviso to sub-section (1) or in sub-section (2) shall, if the woman so desires, be carried out by a woman.

(4) The absence of a woman in the period during which she is entitled to maternity benefit under this Act shall be treated as authorised absence on leave."

4. Section 5 of the said Act shall be re-numbered as sub-section (1) of that section, and —

(a) in the section as so re-numbered,—

(i) after the words "every woman" the words, brackets and figure "other than a woman to whom the provisions of sub-section (2) apply" shall be inserted ;

(ii) for the words "eight annas" the words "twelve annas" shall be substituted ;

(b) to the section as so re-numbered the following sub-section shall be added, namely :—

"(2) Every woman who has worked below ground in a mine or mines of the same owner for not less than ninety days in all during a period not exceeding six months immediately preceding the date on which clause (a) of sub-section (2) of section 3 becomes applicable to her case shall, if she complies with the other conditions imposed by this Act, be entitled to receive, and the owner of the mine shall be liable to make to her, in accordance with the provisions of this Act, a payment at the rate of six rupees a

week for the ten weeks immediately preceding her delivery and for the six weeks following her delivery."

5. In section 7 of the said Act, after the word, brackets and figure "sub-section (1)" the words, brackets and figure "or sub-section (2), as the case may be," shall be inserted.

Amendment of section 8, Act XIX of 1941. 6. In section 8 of the said Act,—

(a) after sub-section (1), the following sub-section shall be inserted, namely:—

"(1A) Where a woman entitled to maternity benefit has given the notice referred to in sub-section (2) of section 4, the manager shall within three days pay to her maternity benefit for ten weeks in advance, unless, within the said three days as a result of the examination referred to in that sub-section, he obtains a certificate that she is not pregnant or not likely to be delivered of a child within ten weeks or the woman refuses to submit to such examination."

(b) in clause (a) of sub-section (2), after the word, brackets and figure "sub-section (1)" the words, brackets, figure and letter "or sub-section (1A)" shall be inserted.

7. In sub-sections (1) and (2) of section 9 of the said Act, after the word, brackets and figure "sub-section (1)" the words, brackets, figure and letter "or sub-section (1A)" shall be inserted.

8. In sub-section (1) of section 10 of the said Act, for the words and figures "section 3, or has obtained permission to absent herself in accordance with section 4" the words, brackets and figures "sub-section (1) of section 3 or in circumstances under which in accordance with this Act the absence is to

be treated as authorised absence on leave" shall be substituted.

Amendment of section 11, Act XIX of 1941. 9. In section 11 of the said Act,—

(a) in sub-section (1), after the words "Chief Inspector or any Inspector" the words "or any other officer authorised in this behalf by the Central Government" shall be added;

(b) in sub-section (2), after the words "the Chief Inspector or Inspector" the words "or other officer" shall be inserted.

10. In section 12 of the said Act, for the word and figure "section 3" the words, brackets and figures "sub-section (1) of section 3" shall be substituted.

Amendment of section 14, Act XIX of 1941. 11. In section 14 of the said Act,—

(a) In sub-section (1), after the words "Chief Inspector" the words "or of an officer authorised in this behalf by the Central Government" shall be added.

(b) In the proviso to sub-section (3) the words "of the Chief Inspector," shall be omitted.

Amendment of section 15, Act XIX of 1941. 12. In sub-section (2) of section 15 of the said Act,—

(a) In clause (c), for the words, brackets and figure "under the proviso to sub-section (1) of" the words "referred to in" shall be substituted.

(b) In clause (f), after the words "the Chief Inspector and Inspectors" the following shall be inserted, namely:—

"and the officers authorised by the Central Government referred to in section 11 and sub-section (1) of section 14."

Notes.—The object of amending the various sections of the Mines Maternity Benefit Act, 1941 is to prohibit the employment of women below ground in mines when in an advanced stage of pregnancy and to grant maternity benefit to those women workers who are so prohibited.

ACT NO. XI OF 1945.

The Aligarh Muslim University (Amendment) Act, 1945.

[Recd. G. G.'s assent on 2nd May 1945.]

An Act further to amend the Aligarh Muslim University Act, 1920.

WHEREAS it is expedient further to amend the Aligarh Muslim University Act, 1920 (XL of 1920), for the purposes hereinafter appearing; It is hereby enacted as follows:—

1. (a) This Act may be called the Aligarh Muslim University (Amendment) Act, 1945.

(b) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

2. In section 16 of the Aligarh Muslim University Act, 1920 (XL of 1920) (hereinafter referred to as the said Act),

the brackets, figure and words "(4) The Pro-Vice-Chancellor, and" shall be deleted; the word "and" shall be added after the words "The Vice-Chancellor"; and for the brackets and figure "(5)" the brackets and figure "(4)" shall be substituted.

Deletion of section 20, Act XL of 1920.

3. Section 20 of the said Act shall be deleted.

4. In section 21 of the said Act, the words "and the Pro-Vice-Chancellor" shall be deleted and the word "and" shall be added before the words "the Vice-Chancellor."

5. In sub-section (1) of section 32 of the said Act, for the words "the Pro-Vice-Chancellor" the words "the Vice-Chancellor" shall be substituted.

6. In sub-section (1) of section 38 of the said Act, (a) for the words "shall appoint persons to fill casual vacancies in the offices of Vice-Chancellor and Pro-Vice-Chancellor" the words "shall appoint a person to fill a casual vacancy in the office of Vice-Chancellor" shall be substituted;

(b) for the word "Persons", where it occurs for the second time, the words "The person" shall be substituted.

Deletion of section 41, Act XL of 1920.

7. Section 41 of the said Act shall be deleted.

Notes.—The amendments made in the Aligarh Muslim University Act, 1920 abolish the office of the Pro-Vice-Chancellor. The amendments were made on the recommendation of the Court of the Aligarh Muslim University which by an overwhelming majority decided at its meeting held on the 16th January 1944 that the office of the Pro-Vice-Chancellor should be abolished.

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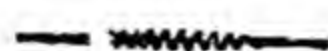
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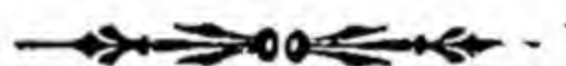
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AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
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AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
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1	49	CWN	72	10con	1945 PeshLJPC	10		18con	1945 O W N	258		38con	1945 PeshLJPC	38	
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	1944-2 M L J	395			221 I C	309			1945 AWRPC	21			11	B R	258
	1944 M W N	714			12	B R	160		ILR (1945) KPC89				46	Cr L J	394
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	47	B L R	599		1945 PeshLJPC	13			1945 A L J	51			1946 M W N	1	
	1945 AWRPC	15			71	I A	178		49	C W N	195		1945 PeshLJPC	42	
	58	M L W	606		ILR (1945) A	225			1945 PeshLJPC	23		46	1945 M W N	47	
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5	49	CWN	6		220 I C	426			47	B L R	250		219 I C	373	
	1944-2 MLJ	358			12	B R	90		72	I A	39		11	B R	437
	1944 M W N	711			ILR (1945) KPC50				1945 AWRPC	1			46	Cr L J	620
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	47	B L R	1	16	49	C W N	100		221 I C	408			1945 PeshLJPC	46	
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	1945 PeshLJPC	8			12	B R	87		1945 M W N	140			72	I A	57
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	1945 A L J	31			ILR (1945)KPC 68				72	I A	27		1945 A L J	258	
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	47	B L R	242		1945 PeshLJPC	18			12	B R	153		11	B R	417
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	12	B R	74		71	I A	203	35	49	C W N	211		ILR (1945)KPC	97	
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AIR 1945 Privy Council		AIR 1945 Privy Council		AIR 1945 Privy Council		AIR 1945 Privy Council	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
54con	1945 A L J 280	74con	1945 A L J 255	98con	58 M L W 228	128con	1945 AWRPC 32
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	219 I C 149	82	1945-1 M L J 397	105	26 P L T 80	136	1945 PeshLJPC136
	20 Luck 162		58 M L W 281		49 C W N 481	137	47 B L R 737
	47 B L R 640		47 B L R 642		1945-2 M L J 46		49 C W N 784
	11 B R 406		1945 A L J 264		1945 PeshLJPC105		1945-2 M L J 231
	1945 A L J 338		220 I C 257	108	49 C W N 491		1945 M W N 520
	47 P L R 318		26 P L T 213		72 I A 156		58 M L W 454
	ILR(1945)KPC148		1945 M W N 532		222 I C 1		1945-13 I T R 384
	1945 PeshLJPC60		12 B R 63		12 B R 256		26 P L T 257
62	49 C W N 334		1945 PeshLJPC82		1945 PeshLJPC108		72 I A 196
	1945-13 I T R 285	83	1945-8 F L J 96	111	49 C W N 517		1945 PeshLJPC137
	80 C L J 13		58 M L W 371		221 I C 427	140	1945 A L J 269
	26 P L T 149		1945 M W N 536		12 B R 229		58 M L W 401
	219 I C 417		1945-2 M L J 314		1945 PeshLJPC111		1945 M W N 610
	11 B R 456		1945 PeshLJPC83	113	49 C W N 485		1945-2 M L J 578
	72 I A 114	85	1945-8 F L J 97		1945 O W N 174		1945 PeshLJPC140
	1945 PeshLJPC62		1945 M W N 596		220 I C 458	144	1945-1 M L J 417
64	1945 M W N 188		1945-13 I T R Sup 14		1945 2 M L J 393		58 M L W 315
	49 C W N 339		1945 PeshLJPC85		1945 M W N 626		1945 A L J 272
	72 I A 1	89	49 C W N 435		12 B R 94		1945 M W N 538
	58 M L W 251		1945-2 M L J 11		1945 AWRPC 25		1945 PeshLJPC144
	1945-1 M L J 399		1945 M W N 355		1945 A L J 520	147	1945 M W N 564
	47 B L R 625		1945-13 I T R 221		59 M L W 46		1945-2 M L J 356
	1945 A L J 265		58 M L W 373		1945 PeshLJPC113		221 I C 67
	219 I C 350		220 I C 35	118	49 C W N 678		1945 A L J 505
	11 B R 445		11 B R 474		1945 M W N 373		50 C W N 107
	46 Cr L J 626		72 I A 141		58 M L W 368		59 M L W 1
	ILR(1945)KPC120		ILR (1946) M 1		1945-2 M L J 144		47 Cr L J 61
	1945 PeshLJPC64		1945 PeshLJPC89		1945 A L J 344		72 I A 226
	ILR (1945) L 325	91	58 M L W 375		219 I C 467		48 B L R 116
67	49 C W N 292		49 C W N 685		11 B R 488		1945 PeshLJPC147
	1945-1 M L J 229		1945-2 M L J 160		47 B L R 941	151	1945 M W N 560
	58 M L W 156		47 B L R 945		72 I A 148		58 M L W 481
	1945 M W N 213		1945 M W N 541		1945 N L J 475		1945-2 M L J 362
	72 I A 104		72 I A 165		26 P L T 229		221 I C 56
	47 B L R 617		ILR (1945) L 411		ILR (1945) L 367		50 C W N 1
	80 C L J 28		1945 PeshLJPC91		46 Cr L J 689		47 Cr L J 1
	1945 A L J 276	94	49 C W N 477		1945 PeshLJPC108		27 P L T 5
	26 P L T 194		47 B L R 634	121	1945-2 M L J 141		1945 PeshLJPC151
	ILR (1945) M 601		58 M L W 343		58 M L W 394		48 B L R 287
	ILR(1945)KPC142		1945-2 M L J 40		1945 M W N 594		1945 M W N 573
	221 I C 501		1945 M W N 366		ILR (1945) A 597	152	58 M L W 504
	12 B R 215		1945 N L J 425		72 I A 133		1945-2 M L J 367
	1945 PeshLJPC 67		1945 A L J 340	124	49 C W N 672		1945 A L J 514
71	49 C W N 299		220 I C 91		220 I C 113		50 C W N 102
	1945 M W N 221		26 P L T 217		11 B R 503		26 P L T 283
	1945-1 M L J 305		72 I A 120		1945 PeshLJPC124		20 Luck 461
	ILR(1945)KPC134		ILR (1945) L 57	128	49 C W N 689		72 I A 277
	12 B R 173		46 Cr L J 662		1945 O W N 270		1945 PeshLJPC152
	221 I C 398		11 B R 493		1945-2 M L J 182	156	1945 M W N 546
	1945 PeshLJPC71		1945 PeshLJPC94		47 B L R 949		1945-2 M L J 325
74	1945 M W N 29	98	1945-1 M L J 225		220 I C 188		221 I C 243
	1945-1 M L J 82		1945 M W N 201		12 B R 53		50 C W N 25
	49 C W N 219		72 I A 91		20 Luck 891		1945-8 F L J 222
	72 I A 76		49 C W N 381		58 M L W 421		72 I A 241

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IR 1945 Privy Council		AIR 1945 Privy Council		AIR 1945 Privy Council		AIR 1945 Privy Council	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
156 con	1945 Pesh LJPC 156	168 con	72 I A 206	176	49 C W N 776	178 con	1945 M W N 620
165	58 M L W 500		ILR (1946) M 73		1945-2 M L J 224		47 B L R 1007
	1945 2 M L J 352		1945 Pesh LJPC 168		58 M L W 438		1946 A L J 1
	1945 M W N 637	170	49 C W N 802		47 B L R 956		72 I A 287
	72 I A 211		1945 Pesh LJPC 170		1945 M W N 623		1945 Pesh LJPC 178
168	1945 Pesh LJPC 165	174	1945 O W N 287		72 I A 296	181	1945 M W N 560
	1945-2 M L J 257		1945 M W N 634		1945 Pesh LJPC 176		58 M L W 523
	49 C W N 788		221 I C 587		ILR (1946) M 142		1945 A L J 511
	47 B L R 959		12 B R 221	178	1945-2 M L J 259		1945 Pesh LJPC 181
	1945 M W N 661		26 P L T 279		49 C W N 820	184	1945 Pesh LJPC 184
	58 M L W 571		1945 Pesh LJPC 174		58 M L W 451	188	1945 Pesh LJPC 188
	1945 A L J 518						

Other Journals = All India Reporter

72 I A		1945 A L J		47 B L R		46 Cr L J		221 I C	
IA	AIR	ALJ	AIR	BLR	AIR	CrLJ	AIR	IC	AIR
1	1945 PC 64	269	1945 PC 140	591	1944 PC 100	662	1945 PC 94	95	1944 PC 80
11	" " 56	272	" " 144	595	1945 " 10	689	" " 118	111	1945 " 102
21	" " 54	276	" " 67	599	" " 1			243	" " 156
27	" " 30	279	" " 77	603	1944 " 96		216 I C	309	" " 10
39	" " 23	280	" " 54	608	1945 " 35	IC	AIR	392	" " 30
57	" " 48	335	" " 134	612	" " 74	19	1944 PC 93	398	" " 71
72	" " 77	338	" " 60	617	" " 67	53	" " 67	408	" " 23
76	" " 74	340	" " 94	621	" " 56	169	" " 76	427	" " 111
85	" " 60	344	" " 118	625	" " 64	178	" " 87	432	" " 77
91	" " 98	505	" " 147	629	" " 98	262	" " 100	451	" " 35
104	" " 67	511	" " 181	634	" " 94			501	" " 67
114	" " 62	514	" " 152	640	" " 60		217 I C	531	" " 132
120	" " 94	518	" " 168	642	" " 82	IC	AIR	587	" " 174
133	" " 121	520	" " 113	733	" " 134	1	1945 PC 18	603	" " 38
141	" " 89	550	1946 " 1	737	" " 137	381	" " 42		ILR (1945) Mad
148	" " 118			941	" " 118				ILR AIR
156	" " 108	1945 AWR (PC)		945	" " 91		218 I C		
165	" " 91	AWR AIR		949	" " 128	IC	AIR	1	1944 PC 71
176	" " 128	1	1945 PC 23	956	" " 176	244	1944 PC 364	237	" " 54
189	" " 134	8	1944 " 85	959	" " 168	333	" " 71	535	1945 " 77
196	" " 137	12	" " 100	1007	" " 178			601	" " 67
206	" " 168	15	1945 " 1				219 I C		(1945) 1 MLJ
211	" " 165	18	" " 103		80 CLJ	IC	AIR		MLJ AIR
226	" " 147	21	" " 18	CLJ	AIR	1	1944 PC 78	76	1945 PC 48
241	" " 156	25	" " 113	13	1945 PC 62	67	1945 " 56	82	" " 74
270	1946 " 1	32	" " 128	19	" " 18	136	" " 79	86	" " 18
277	1945 " 152	37	" " 13	28	" " 67	149	" " 60	91	" " 30
287	" " 178	40	" " 42		ILR (1945) Lah	225	1944 " 65	97	" " 23
296	" " 176				ILR AIR	263	1945 " 48	136	" " 35
305	1946 " 16	ILR (1945) Bom		1	1945 PC 18	350	" " 64	225	" " 93
315	" " 6	ILR AIR		57	" " 94	373	" " 46	229	" " 67
	1945 FCR	153	1944 PC 88	325	" " 64	417	" " 118	253	" " 54
FCR	AIR	189	1945 " 8	367	" " 118	467	" " 118	249	" " 56
161	1945 PC 48	440	" " 54	411	" " 91			257	" " 77
179	" " 98			451	1946 " 1	IC	AIR	305	" " 71
	ILR (1945) All	BLR AIR			47 PLR	28	1945 PC 54	309	" " 60
ILR	AIR	1	1945 PC 5		PLR AIR	35	" " 89	397	" " 82
225	1945 PC 13	233	1944 " 88	20	1944 PC 100	49	" " 74	399	" " 64
231	" " 30	242	1945 " 8	24	" " 87	91	" " 94	417	" " 144
241	" " 74	245	" " 18	25	1945 " 10	113	" " 124		(1945) 2 MLJ
597	" " 121	250	" " 23	27	" " 8	143	" " 98		MLJ AIR
	1945 ALJ	260	" " 48	30	1944 " 96	152	1944 " 58	11	1945 PC 89
ALJ	AIR	267	" " 30	30	1945 " 60	181	" " 85	40	" " 94
28	1945 PC 10	274	" " 54	318	1943 " 159	188	1945 " 128	46	" " 105
31	" " 8	522	1943 " 130	366		197	1944 " 88	75	" " 103
34	" " 38	525	" " 164		46 CrLJ	206	1945 " 103	109	" " 134
47	" " 18	545	" " 153		CrLJ AIR	215	1946 " 12	141	" " 121
51	" " 23	553	" " 208	105	1944 PC 93	257	1945 " 82	144	" " 118
239	" " 13	557	" " 189	119	" " 73	362	" " 8	160	" " 91
252	" " 79	561	" " 185	318	1943 " 202	426	" " 13	162	" " 123
255	" " 74	566	1944 " 1	394	1945 " 42	458	" " 113	223	" " 132
258	" " 48	571	" " 11	413	" " 18	504	" " 16	224	" " 176
264	" " 82	574	" " 32	589	" " 48		221 I C	231	" " 137
265	" " 64	575	" " 33	620	" " 46	IC	AIR	257	" " 168
		578	" " 58	626	" " 64	56	1945 PC 151	259	" " 178
		587	" " 71			67	" " 147		

Other Journals = All India Reporter (concl'd.)																			
12 (1945) 2 M L J				1945 M W N				1945 N L J				26 P L T				1945 Pesh L J (PC)			
MLJ AIR				MWN AIR				NLJ AIR				PLT AIR				PeshLJ AIR			
314	1945	PC	83	139	1945	PC	77	1	1945	PC	16	29	1944	PC	96	105	1945	PC	105
325	"	"	156	140	"	"	30	425	"	"	94	56	1945	"	18	108	"	"	108
352	"	"	165	188	"	"	64	475	"	"	118	80	"	"	105	111	"	"	111
356	"	"	147	193	"	"	60	480	"	"	132	113	"	"	56	113	"	"	113
362	"	"	151	201	"	"	98	ILR 20 Luck				137	"	"	48	118	"	"	118
367	"	"	152	213	"	"	67	ILR AIR				149	"	"	62	121	"	"	121
393	"	"	113	217	"	"	54	162 1945 PC 60				176	"	"	134	124	"	"	124
446	"	"	46	221	"	"	71	391	"	"	128	194	"	"	67	128	"	"	128
486	1946	"	16	252	"	"	56	461	"	"	152	213	"	"	82	132	"	"	132
493	"	"	3	322	"	"	35	551	"	"	103	217	"	"	94	134	"	"	134
496	"	"	6	355	"	"	89	1945 OWN				229	"	"	118	136	"	"	136
578	1945	"	140	366	"	"	94	OWN AIR				257	"	"	137	137	"	"	137
58 MLW				371	"	"	134	174 1945 PC 113				279	"	"	174	140	"	"	140
MLW AIR				373	"	"	118	258 " " 18				283	"	"	152	144	"	"	144
1	1945	PC	10	520	"	"	137	264 " " 103				11 Cut L T				147	"	"	147
47	"	"	30	532	"	"	82	270 " " 128				CutLT AIR				151	"	"	151
57	"	"	18	536	"	"	83	287 " " 174				1 1944 PC 96				152	"	"	152
62	"	"	46	538	"	"	144	ILR 24 Pat				1945 Pesh LJ(PC)				156	"	"	156
64	"	"	48	541	"	"	91	ILR AIR				Pesh LJ AIR				165	"	"	165
156	"	"	67	546	"	"	156	89 1944 PC 96				1 1945 PC				168	"	"	168
176	"	"	54	560a	"	"	151	11 BR				5 " "				170	"	"	170
191	"	"	77	560b	"	"	181	BR AIR				8 " "				174	"	"	174
226	"	"	60	564	"	"	147	14 1944 PC 46				10 " "				176	"	"	176
228	"	"	98	573	"	"	152	81 " " 50				13 " "				178	"	"	178
251	"	"	64	594	"	"	121	94 " " 73				16 " "				181	"	"	181
281	"	"	82	596	"	"	85	119 " " 83				18 " "				184	"	"	184
315	"	"	144	610	"	"	140	124 " " 67				23 " "				188	"	"	188
343	"	"	94	620	"	"	178	133 " " 76				30 " "				ILR (1945) Kar			
347	"	"	134	623	"	"	176	137 " " 87				35 " "				(P C)			
368	"	"	118	626	"	"	113	162 " " 100				38 " "				ILR AIR			
371	"	"	83	634	"	"	174	180 1945 " 18				42 " "				1 1944 PC	83		
373	"	"	89	637	"	"	165	258 " " 42				46 " "				4 " "	80		
375	"	"	91	661	"	"	168	317 1944 " 96				48 " "				10 " "	87		
394	"	"	121	778	1946	"	16	337 " " 71				54 " "				12 " "	85		
401	"	"	140	1945-13 ITR				363 " " 78				56 " "				17 " "	88		
421	"	"	128	ITR AIR				395 1945 " 79				60 " "				28 " "	96		
438	"	"	176	221 1945 PC 89				406 " " 60				62 " "				36 " "	100		
451	"	"	178	285 " " 62				413 1944 " 65				64 " "				43 1945	5		
454	"	"	137	384 " " 137				417 1945 " 48				67 " "				50 " "	13		
481	"	"	151	14Sup " " 85				437 " " 46				71 " "				56 " "	8		
485	"	"	132	1945-8 FLJ				445 " " 64				74 " "				61 " "	1		
500	"	"	165	FLJ AIR				456 " " 62				77 " "				68 " "	16		
504	"	"	152	1 1945 PC 48				470 " " 54				79 " "				73 " "	23		
528	"	"	181	48 " " 18				474 " " 89				82 " "				89 " "	18		
571	"	"	168	69 " " 98				477 " " 74				83 " "				97 " "	48		
606	"	"	1	96 " " 83				488 " " 118				85 " "				103 " "	74		
1945 MWN				97 " " 85				493 " " 94				89 " "				115 " "	54		
MWN AIR				222 " " 156				503 " " 124				91 " "				120 " "	64		
29	1945	PC	74	ILR (1945) Nag				102 " "				94 " "				127 " "	56		
33	"	"	23	ILR AIR				103 " "				98 " "				134 " "	71		
41(2)	"	"	48	1 1945 PC 16								98 " "				142 " "	67		
47	"	"	46									102 " "				148 " "	60		
49	"	"	18									103 " "				153 " "	98		

CASES OVERRULED AND REVERSED IN A. I. R. (32) 1945 PRIVY COUNCIL

Annamalai Chettiar v. Valliammai Achi, ('43) I.L.R. (1943) Mad. 485 = (1943) 1 M. L. J. 95=1943 M. W. N. 83=30 A. I. R. 1943 Mad. 398 (2)=210 I. C. 79	Reversed in A.I.R. (32) 1945 P. C. 176.
Benoari Lall Sarma v. Emperor, ('43) 44 Cr. L. J. 673 = 30 A. I. R. 1943 Cal. 285=207 I. C. 481	Reversed in A. I. R. (32) 1945 P. C. 48.
Chandra Shankar Pranshankar v. Bai Magan, ('14) 38 Bom 576=16 Bom L R 236=1 A I R 1914 Bom 55=24 I C 730	OVERRULED IN A. I. R. (32) 1945 P. C. 74.
Durga Devi, Mt. v. Nand Lal, ('32) 33 PLR 138=19 A I R 1932 Lah 231=136 I C 732	OVERRULED IN A. I. R. (32) 1945 P. C. 152.
Emperor v. Benoari Lall Sarma, ('43) 1943 M.W.N. 380=47 C.W.N. F. C. 41=(1943) 6 F. L. J. F. C. 79=(1943) 2 M.L.J. 207=I.L.R. (1943) Kar. F.C. 48=24 P.L.T. 230=10 B.R. 102=I.L.R. (1943) 2 Cal. 1=30 A.I.R. 1943 F. C. 36=208 I. C. 564	Reversed in A. I. R. (32) 1945 P. C. 48.
Emperor v. Hemendra Prosad Ghoshe, ('39) 43 C. W. N. 950=69 C. L. J. 599=I. L. R. (1939) 2 Cal. 411=40 Cr. L. J. 782=26 A. I. R. 1939 Cal. 529=183 I. C. 349	OVERRULED IN A. I. R. (32) 1945 P. C. 156.
Emperor v. Sibnath Banerji, ('43) 1944 F. C. R. 1=I.L.R. (1943) Kar. F. C. 103=1943 M.W.N. 612=1943-2 M.L.J. 468=24 P.L.T. 332=1943-6 F.L.J. F. C. 151=10 B. R. 394=48 C. W. N. F. R. 1=45 Cr. L. J. 341=30 A. I. R. 1943 F.C. 75=211 I. C. 241 (F. C.)	Reversed in A. I. R. (32) 1945 P. C. 156.
Govinddas Rajaramdas Devi v. Ganpatdas Narottamdas, ('23) 47 Bom 783 = 25 Bom L R 518 = 10 A I R 1923 Bom 431=73 I C 1030	OVERRULED IN A. I. R. (32) 1945 P. C. 176.
Kesar Chand v. Uttam Chand, ('42) 43 P L R 569=29 A I R 1942 Lah 6=198 I C 638	Reversed in A. I. R. (32) 1945 P. C. 91.
Keshav Talpade v. Emperor, ('43) 1943 F. C. R. 49 =I. L. R. (1944) Bom. 183 = I. L. R. (1943) Kar. F.C. 26=1943 M. W. N. 327 = 9 B. R. 390=47 C. W. N. F. C. 13= 1943 O. W. N. 224 = 1943-2 M. L. J. 19=44 Cr. L. J. 558=24 P. L. T. 158=1943-6 F. L. J. F. C. 28=46 Bom. L. R. 22=30 A.I.R. 1943 F.C. 1=207 I. C. 1 (F.C.)	OVERRULED IN A. I. R. (32) 1945 P. C. 156.
Lyallpur Bank, Ltd. v. Ramji Das, ('40) 1940 O.W.N. 132=15 Luck. 332=1940 A.W.R. 63=1940 O.L.R. 75=27 A. I. R. 1940 Oudh 237=185 I.C. 889	Reversed in A. I. R. (32) 1945 P. C. 60.
Madan Theatres v. Dinshaw & Co. Bankers, Ltd., ('42) 18 Luck. 71 = 1942 O. W. N. 276 = 1942 A. W. R. C.C. 199=29 A. I. R. 1942 Oudh 358=200 I. C. 465	Reversed in A. I. R. (32) 1945 P. C. 152.
Maluk Chand v. Mani Lal, ('04) 28 Bom 364	OVERRULED IN A. I. R. (32) 1945 P. C. 74.
Manmatha Nath Bose v. Sm. Renula Bose, ('41) 45 C.W.N. 1091	Reversed in A. I. R. (32) 1945 P. C. 108.
Manmatha Nath Bose v. Sm. Renula Bose, ('41) 45 C. W. N. 863=28 A.I. R. 1941 Cal. 681 = 198 I. C. 71	Reversed in A. I. R. (32) 1945 P. C. 108.
Mazbut Singh v. Mt. Indrani, ('36) 11 Luck. 500=1935 O. L. R. 585=1935 O W N 1087=23 A.I.R. 1936 Oudh 152=158 I. C. 419	OVERRULED IN A. I. R. (32) 1945 P. C. 152.
Piara Lal v. Bulaqi Mal & Sons, ('35) 22 A I R 1935 Lah 168=158 I C 83	OVERRULED IN A. I. R. (32) 1945 P. C. 152.
Polson, P. E. In re, ('42) I L R (1942) Bom 216=43 Bom L R 1034 = (1942) 10 I T R 52=29 A I R 1942 Bom 50=198 I C 430	Reversed in A. I. R. (32) 1945 P. C. 137.
Raja Ram v. Allahabad Bank Ltd., ('39) ILR (1939) Lah 313=41 P L R 26=26 A I R 1939 Lah 79=185 I C 75	OVERRULED IN A. I. R. (32) 1945 P. C. 152.
Sewa Ram v. Parbhu Dayal, ('35) 11 Luck. 116=1935 O.L.R. 282=1935 O. W. N. 541=22 A.I.R. 1935 Oudh 313=155 I. C. 231	OVERRULED IN A. I. R. (32) 1945 P. C. 152.
Singha Raja v. Pethu Raja, ('19) 42 Mad. 61 = 35 M. L. J. 579=24 M. L. T. 501=8 M. L. W. 497 1918 M. W. N. 809=6 A. I. R. 1919 Mad. 792=48 I. C. 196	OVERRULED IN A. I. R. (32) 1945 P. C. 152.
Triloki Nath v. Sadhu Ram, ('27) 14 A. I. R. 1927 Oudh 275=102 I. C. 428	OVERRULED IN A. I. R. (32) 1945 P. C. 152.

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PRIVY COUNCIL

A. I. R. (32) 1945 Privy Council 1
(From Allahabad : ('39) 26 A. I. R.
1939 All. 486)

27th July 1944

LORD PORTER, LORD GODDARD AND
SIR MADHAVAN NAIR

*Shri 108 Puja Pad Udit Panch Parme-
shwar Panchaiti Akhara Udasi Nir-
wani — Appellant*

v.

*Surajpal Singh alias Chhedi Singh and
others — Respondents.*

Privy Council Appeal No. 13 of 1942; Allahabad
Appeal No. 24 of 1939.

(a) Hindu law — Joint family — Father — Debt incurred to pay off antecedent debt — Pious obligation of son to pay — Father purchasing property subject to mortgage but failing to pay mortgagee amount left with him — Debt incurred to pay off mortgage is not one for payment of antecedent debt.

Under the Hindu law, the son is under a pious obligation to pay a debt incurred by his father to pay off an antecedent debt : ('24) 11 A. I. R. 1924 P. C. 50, *Rel. on.* [P 3 C 1]

The father purchased for Rs. 2600 certain property which was subject to a mortgage. Rs. 400 were handed over to the vendor and the remaining rupees 2200 retained to answer the principal and interest to date on the mortgage. But this amount was not used to pay off the mortgage but was used for some other purpose :

Held that the father could not be said to have been indebted to the mortgagee in respect of rupees 2200 which were left with him for payment to the mortgagee because the father was under no liability to the mortgagee in respect of that sum and therefore a debt incurred by the father to pay off the mortgagee could not be said to have been incurred for payment of an antecedent debt so as to make the sons liable for the same. [P 3 C 2]

(b) Hindu law — Joint family — Family benefit — Manager purchasing property subject to mortgage but failing to pay mortgagee amount left with him — Subsequent mortgage of family property in favour of mortgagee at lower rate of interest — Paying off of previous mortgage and inclusion of debt so incurred in subsequent mortgage held not beneficial to family.

The manager of a joint Hindu family purchased property J which was subject to a mortgage. The manager failed to pay to the mortgagee the amount which was left with him by the vendor for that pur-

pose and used it for some other purpose. Subsequently the manager mortgaged the entire family properties to the same mortgagee at a lower rate of interest and included in the mortgage the amount due under the previous mortgage with the result that the property J became free of the previous mortgage though it became subject to the second mortgage. It was urged that as the property J became joint family property and was subject to the original mortgage until it was paid off, it was beneficial to reduce the interest by redeeming the earlier mortgage and transferring the liability to the later even though the joint family property as a whole thereby became mortgaged instead of, as formerly, only the particular property J :

Held that no evidence of the value of the property J had been given, and in the embarrassed state of the family it almost certainly would have had to be sold to answer the principal and interest secured by the one mortgage or the other. Instead of imposing a liability upon the family the manager might well have allowed the property to be sold. No doubt by so doing he would have deprived the family of an asset which otherwise would be theirs, but it was by no means clear that having regard to the mortgage with which it was burdened the asset was a valuable one or that to preserve it even at the lower rate of 10 annas per month in the place of a rupee a month as provided by the earlier mortgage was beneficial to the family. Even at the reduced rate it might well have been wiser to sacrifice the property J rather than to burden the entire family estate with the additional sum. The inclusion in the second mortgage of amount due under the first therefore could not be said to have been for the benefit of the family. [P 3 C 2]

(c) Hindu law — Joint family — Alienation — Alienation by father — Right of after-born son to challenge alienation.

The rule that a member of a joint family must be content with the family estate as he finds it at his birth or at any rate he cannot complain of anything done before the period of gestation, admits of an exception to the effect that if the child who objects to the alienation of the property by the father comes into existence or is conceived after the alienation, but during the life of a child born or conceived before the alienation, then that overlapping of the two lives enables the later-born son to contest the validity of the father's act. [P 4 C 1]

(*Quære*) — Whether this limitation upon the right of an after-born child to resist the claim of an encumbrance upon the family estate correctly expresses the law in all respects. [P 4 C 1]

(d) Hindu law — Debts — Antecedent debt — Whether mortgage was for paying off antecedent debt — Test.

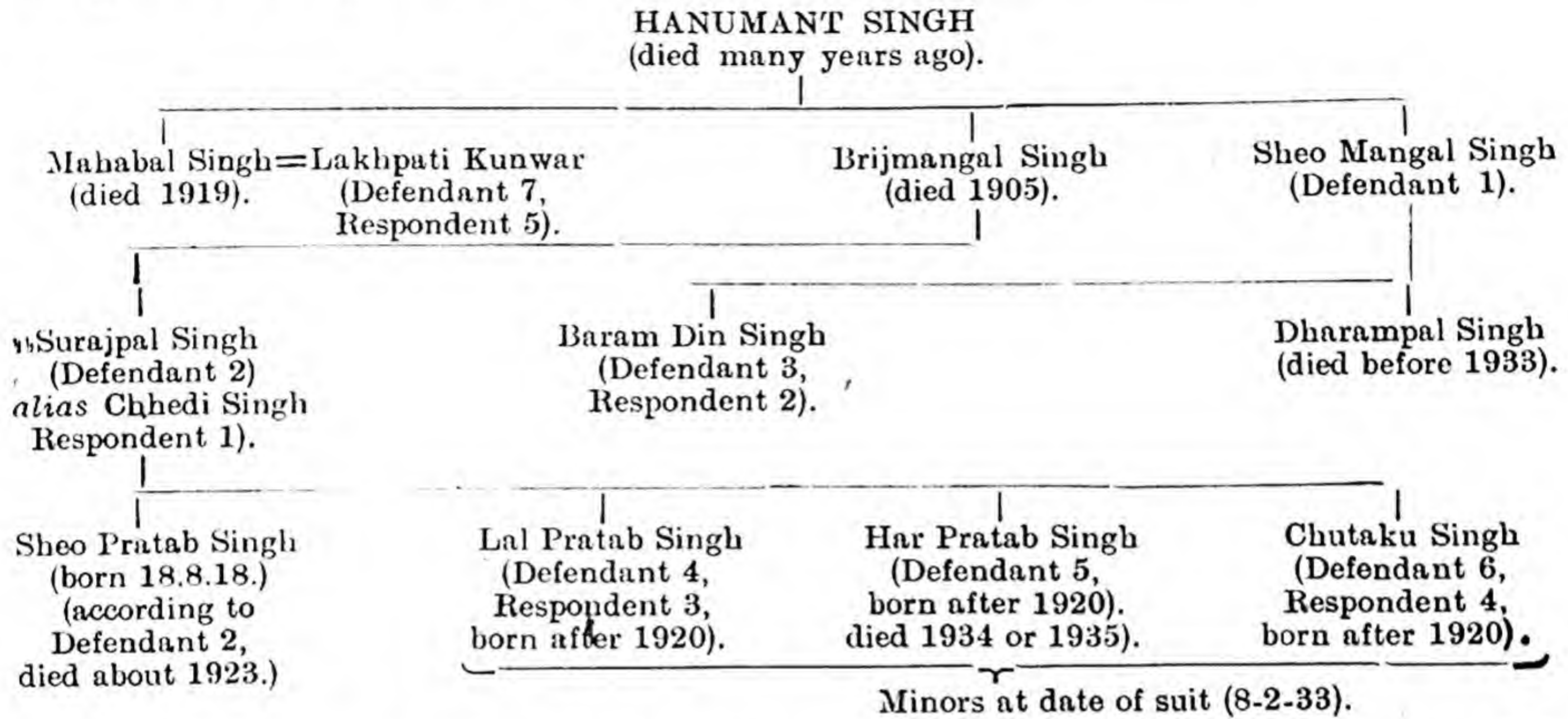
The question whether a mortgage was executed in order to pay off an antecedent debt depends on whe-

ther the sums in respect of which the mortgage was executed were borrowed without any promise of future security or whether from the first there was an undertaking to secure them by mortgage so that the whole matter was one transaction, not first a lending and at a later stage a consolidation of the sums lent and a separate transaction whereby they were secured on the mortgaged property. [P 4 C 2]

Sir Thomas Strangman and A. G. P. Pullan —
for Appellant.
Respondents Ex parte.

Lord Porter—The appellant in this case is a registered society which carries on the

business of moneylending. It appeals from a decree of the High Court at Allahabad, dated 8th February 1939, which varied the decree of the Subordinate Judge. The respondents are members of a joint undivided Hindu family governed by the Mitakshara school. The decree of which complaint is made was pronounced in an action brought by the appellant upon a simple mortgage dated 22nd September 1920. The family tree of the Hindu family and the members sued appear from the table following:



By the mortgage of 22nd September 1920, Sheo Mangal Singh who was then karta of the family, Surajpal Singh, his nephew and Lakhpati Kunwar his sister-in-law mortgaged

certain family property in favour of the appellant. This mortgage was given in consideration of a sum of Rs. 35,542-1-0 made up as follows:

Item	Rs.	A.	P.	Rs.	A.	P.
1. Promissory Note dated the 30th October, 1917, executed by Mahabal Singh	—			4,153	0	0
2. "Due under the account book" [According to Plaintiff's cash book, borrowed by Sheo Mangal Singh on the 22nd December, 1918, for purchasing linseed.]	—			461	0	0
Interest on the above two items	—			517	13	0
3. Due to the Plaintiff under a mortgage dated the 26th September, 1916 subject to which Sheo Mangal Singh had purchased the mortgaged, property on the 3rd September, 1917 Amounts borrowed on promissory notes, in order to pay off debts due by Rudra Pratab Singh (a son of a sister of Sheo Mangal Singh), as under :—	—			2,756	5	9
4. Promissory Note dated the 14th March, 1919	8,500	0	0			
5. Promissory Note dated the 20th March, 1919	2,500	0	0			
6. Promissory Note dated the 24th March, 1919	500	0	0			
7. Promissory Note dated the 15th April, 1919	2,000	0	0			
8. Promissory Note dated the 12th June, 1919	10,000	0	0			
Interest on the above	2,575	9	3			
				26,075	9	3
[N. B.—The Promissory Notes for Rs. 8,500 and Rs. 2,500 were executed by both Mahabal Singh and Sheo Mangal Singh, that for Rupees 500 by Mahabal Singh and the remaining two by Sheo Mangal Singh.]						
9. Amount borrowed by Sheo Mangal Singh on a Promissory Note in order to pay Government Revenue : Promissory Note dated 2nd February, 1920, signed by Sheo Mangal Singh	1,000	0	0			
Interest	55	13	0			
				1,055	13	0
10. Loan taken on the 9th October, 1920, for completion of the deed and for other expenses	—			522	8	0
				35,542	1	0

The principal sum and interest was payable after six years and interest was to run at 10 annas per cent. per month with yearly rests. The mortgage deed was executed by Lakhpati as a nominal party only because her name appears to have been inserted in the register as an owner in the case of some of the properties. The question which their Lordships have to determine is the extent to which the joint family property is bound. Of the items claimed: Nos. 1 and 2 have been disallowed by the High Court against all the respondents and the appellants do not now dispute this decision. Both Courts allowed item 9 as against the respondents and no appeal has been taken against this decision. Accordingly, the right of the appellant to recover in respect of items 3 to 8 alone is in dispute but as the questions arising under item 3 differ somewhat from those arising under items 4 to 8 the facts must be separately set out.

Before September 1916, Raghubar and Rani Adhin, who appear to have been its then owners, mortgaged the village of Jitpur to the plaintiff to secure a loan of Rs. 1950 with interest at 1 per cent. per month with half-yearly rests. On 3rd September 1917, Raghubar transferred an 8 annas share in most of the village to Sheo Mangal Singh for Rs. 2600 of which 400 Rs. were handed over to the vendor and the remaining 2200 retained to answer the principal sum and interest to date on the mortgage. This last sum was not however used to pay off that mortgage. It was used for some other purpose and the sum of Rupees 2756-5-9 included in the mortgage in suit under item 3 was borrowed and used in order to free the village from that liability. The land so purchased is undoubtedly family property and itself subject to the mortgage in suit to the extent of the principal sum of Rs. 2756-5-9 with interest at the contractual rate, but the appellant claims that the whole of the rest of the family estate is likewise bound as security for this debt.

The paying off of the old mortgage and inclusion of the debt so incurred in the new is in the first place said to be beneficial to the family and therefore properly imposed as a liability upon the whole of the family property. Secondly, it was said that in any case the debt was incurred by Sheo Mangal Singh in payment of an antecedent debt owing by him and therefore that it was the duty of his son Baram Din to answer his father's debt, whether the father was alive or dead. If there had been an antecedent debt owing to the appellant which Sheo Mangal Singh was legally obliged to pay, Baram Din might be liable under the well-known doctrine the principles of which are set out by their Lordships' judg-

ment in 51 I. A. 129¹ at p. 135. But Mangal Singh in fact was not previously indebted to the appellant. Rupees 2200 had, it is true, been left with him by Raghubar that he might pay it to the appellant but Mangal Singh was under no liability to the appellant in respect of this sum.

There was, therefore, no antecedent debt and the appellant is thrown back upon the argument that the inclusion of the sum of Rs. 2756-5-9 on the mortgage sued upon was for the benefit of the family. Undoubtedly, the eight annas share in the village became joint family property and was subject to the original mortgage until it was paid off. Accordingly it is urged, that it was beneficial to reduce the interest by redeeming the earlier mortgage and transferring the liability to the later even though the joint family property as a whole thereby became mortgaged instead of, as formerly, only the particular village of Jitpur. Their Lordships are not persuaded that this is so. No evidence of the value of the encumbered village has been given, and in the embarrassed state of the family it almost certainly would have had to be sold to answer the principal and interest secured by the one mortgage or the other. Instead of imposing a liability upon the family, Sheo Mangal Singh might well have allowed the property to be sold. It is true that by so doing he would have deprived the family of an asset which otherwise would be theirs, but it is by no means clear that having regard to the mortgage with which it was burdened the asset was a valuable one or that to preserve it even at the lower rate of ten annas per month in the place of a rupee a month as provided by the earlier mortgage was beneficial to the family. Even at the reduced rate it might well have been wiser to sacrifice the village rather than to burden the entire family estate with the additional sum. This is the view of the High Court and their Lordships see no reason for differing from it.

Items 4 to 8 were borrowed in order to pay the debts and preserve the estate of one Rudra Pratab Singh, a son of a sister of Mahabal Singh. It is not now contended that this borrowing was either for necessity or beneficial to the family. Two defences, however, are set up—firstly, that the infant sons of Surajpal Singh are not entitled to contest the liability of the family estate as security for the mortgage debt and secondly, that in any case the liability was incurred in order to repay their father's antecedent debt. In support of the former proposition, it is asserted that a mem-

1. (24) 11 A. I. R. 1924 P. C. 50 : 46 All. 95 : 51 I. A. 129 : 77 I. C. 689 (P. C.), Brij Narain v. Mangla Prasad.

ber of a joint family must be content with the family estate as he finds it at his birth or at any rate he cannot complain of anything done before the period of gestation. Upon this rule, it is admitted, there is engrafted an exception to the effect that if the child who objects to the alienation of the property comes into existence or is conceived after the alienation, but during the life of a child born or conceived before the alienation, then that overlapping of the two lives enables the later-born child to contest the validity of the father's act. Their Lordships do not think it necessary to determine whether this limitation upon the right of an after-born child to resist the claim of an encumbrance upon the family estate correctly expresses the law in all respects. They are content to assume its accuracy since they agree with the High Court in thinking it sufficiently established by the evidence that there was overlapping of lives in the present case. The matter stands thus: Surajpal Singh stated that his first son was born on 18th August 1918 (i. e., two years before the mortgage in question) and produced the birth register in support of his statement. He did not, however, produce the death certificate of that son nor the birth certificates or horoscopes of his younger sons. He did, however, say that his second son was seven months old when his eldest son died and in cross-examination that horoscopes of his sons had been prepared and were at his house, and that he kept accounts of income. The learned Subordinate Judge did not accept his evidence on the ground (1) that he had not produced the horoscopes, whereas he would in the learned Judge's view have done so if they had supported his evidence, (2) that he had not produced the death certificate of the eldest son and (3) that if accounts of income were kept accounts of expenditure must also have been kept and would show the date on which money had been expended for the funeral ceremonies. It is to be observed, however, that no question as to the time at which the eldest son died or his brothers were born was expressly raised in the pleadings nor did it form one of the issues. Consequently Surajpal may well be excused for not coming to Court armed with the death certificates or horoscopes: the birth certificate was of course essential to show that a son was alive at the date of the mortgage. It was for the appellant who raised the point to challenge Surajpal's evidence by cross-examination, and he did not do so. The actual questions asked were most perfunctory—the production either of the death certificates, the horoscopes or the accounts was not asked for. Nor do their Lordships consider that Surajpal's evidence is

weakened by his statement that he did not know the date of his birth or of the birth of any of his sons. He might well have forgotten the exact dates and yet remember that one son died after another was born. Their Lordships agree with the High Court in thinking that there is no sufficient reason for rejecting the evidence of Surajpal upon this point which could have been challenged quite easily by the appellant in cross-examination or by the production of the death certificate of the eldest son. In default of any serious challenge their Lordships, like the High Court, think it sufficiently established that the first born son did not die until after the birth of a younger brother, and hold that the minor sons are entitled to challenge the validity of the mortgage.

There remains the question whether the borrowing was undertaken in order to discharge the antecedent debt of a father. The answer depends on whether the sums set out under items 4, 5, 7 and 8 were first borrowed without any promise of future security or whether from the first there was an undertaking to secure them by mortgage, so that the whole matter was one transaction, not first a lending and at a later stage a consolidation of the sums lent and a separate transaction whereby they were secured on the mortgaged property. The appellant's witness, Bharam Das denied that there was any agreement for a mortgage when the money was lent and the promissory notes given and the learned Subordinate Judge thought the transactions separate ones. He points out that the promissory notes are dated from 'March to June 1919, whereas the mortgage did not take place until 22nd September 1920, more than a year later, and that if the giving of a mortgage was part of the original transaction, the bargain would most naturally have been proved by Sheo Mangal Singh who with his deceased brother Mahabal Singh had been a party to it. No doubt Sheo Mangal Singh might have given this evidence, but it has to be remembered that he was himself personally liable and did not even think fit to defend this action. In his absence the respondents called Suraj Din, a friend of Mahabal and Sheo Mangal Singh, who said he was present when the loan of Rs. 8500 was made and that a mortgage was then promised. In this conflict of evidence, their Lordships agree with the High Court that the appellant is most unlikely to have been willing to lend so large a sum to an indigent family except on the security of their property. The view of the High Court on this point is expressed in the words:

"It seems to us impossible that the plaintiff did not intend there should be a mortgage for these loans and we consider that from the beginning the

appellant intended that there should be such a mortgage."

Their Lordships find themselves in agreement with this view and like the High Court are of opinion that the debts were not antecedent but that the whole transaction was conceived and carried out as part of the same bargain. In accordance with these views they would dismiss the appeal and confirm the decree of the High Court and will humbly advise His Majesty accordingly. As the respondents have not appeared there will be no order as to costs.

G.N.

Appeal dismissed.

Solicitors for Appellant — *Douglas Grant & Dold.*
Respondents *ex parte.*

A. I. R. (32) 1945 Privy Council 5

(From Bombay : ('39) 26 A. I. R.
1939 Bom. 1)

24th July 1944

LORD THANKERTON, LORD WRIGHT AND
SIR MADHAVAN NAIR

Narayan Jivangouda Patil and another
— Appellants

v.

Puttabai and others — Respondents.

Privy Council Appeal No. 16 of 1942.

Limitation Act (1908), S. 15 — Injunction restraining defendant from interfering with plaintiff's possession—Defendant held not restrained from bringing suit for possession so as to exclude period during which injunction was issued by trial Court and dissolved by Privy Council.—Defendant also held not entitled to claim restitution under Civil Procedure Code, Ss. 144 and 151.

The question whether in a particular case a party has been restrained by an injunction or order from instituting a suit must always depend for its decision upon the order, or the decree, made in the case.
[P 7 C 2]

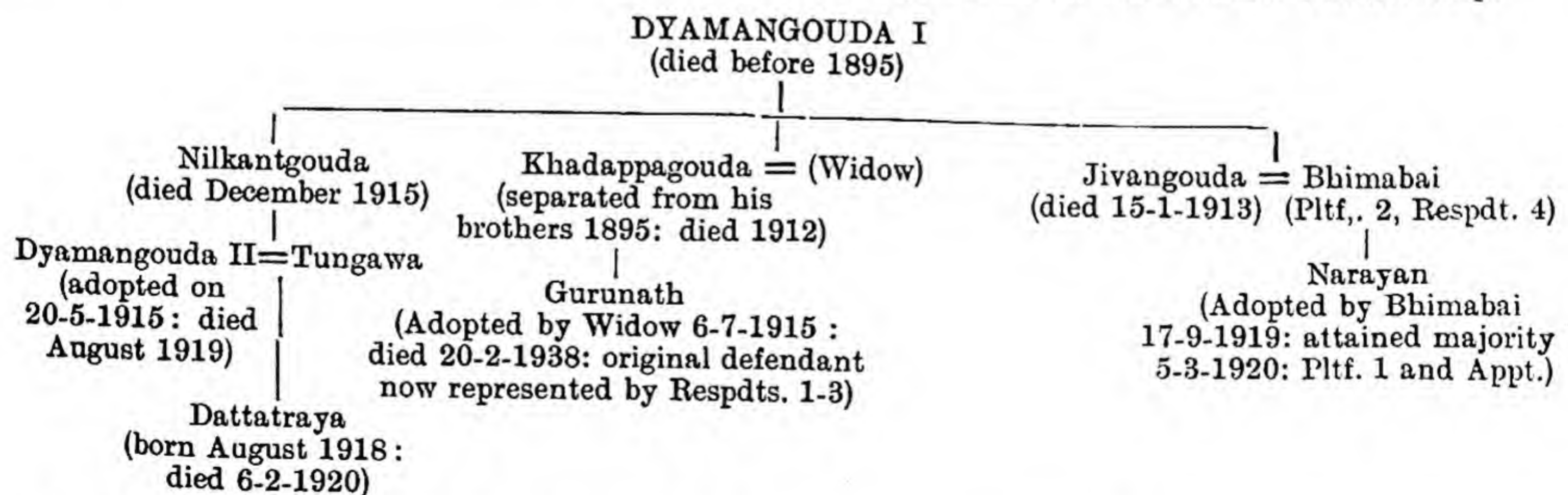
In a suit for declaration and possession, a temporary injunction which was subsequently confirmed by the decree restrained the defendant from interfering with plaintiff's possession. The defendant was also not to cause obstruction in any way to the plaintiff in removing the crops grown by him or in accepting or recovering the amount of rent of the said lands from the tenants. The decree was ultimately set aside by the Privy Council :

Held that there was no prohibition, either express or even implied, in the injunction or the decree which restrained the defendant from instituting a suit for possession. The institution of a suit could not be said to be futile, if it would thereby prevent the running of limitation only because the title of the parties was involved in the suit. Subsequent suit by defendants after 12 years from the date of dispossession was barred by limitation. Section 15 did not entitle defendant to exclude the time between the plaintiff's suit and decision of the Privy Council. The defendant also was not entitled to restitution and other reliefs claimed by him in his petition under S. 144 and S. 151, Civil P. C. [P 8 C 1]

Sir Thomas Strangman and S. P. Khambatta—
for Appellants.

J. M. Parikh and V. K. Krishna Menon —
for Respondents.

Sir Madhavan Nair. — These are consolidated appeals from a judgment and two decrees of the High Court of Judicature at Bombay dated 14th January 1938, affirming a decree of the First Class Subordinate Judge of Dharwar dated 31st October 1936, and an order of that Judge dated 21st November 1936. The questions which arise in the appeals are : (1) Whether the plaintiffs' suit is barred by limitation. (2) Whether Narayan (plaintiff 1, hereinafter referred to as the appellant) was entitled to restitution or other relief consequent upon a decision of the Privy Council in 60 I. A. 25,¹ hereinafter mentioned. The parties to the suit are Hindus governed by the Bombay School of the Mitakshara law. The table given below shows their relationship.



One Dyamangouda I and his three sons Nilkantgouda, Khadappagouda and Jivangouda formed a joint and undivided Hindu family. Dyamangouda died sometime before 1895 leaving him surviving, his three sons who took the family properties including the properties now in suit by survivorship. In 1895, Khadappagouda separated from his two brothers who

continued joint, and the properties now in suit are those which were allotted to the two brothers jointly. The bulk of the properties consisted of watan lands. Khadappagouda died in 1912, leaving a widow but without a male

1. ('33) 20 A. I. R. 1933 P. C. 1 : 57 Bom. 157 : 60 I. A. 25: 141 I. C. 9 (P.C.), Bhimabai Jivangouda v. Gurunath Gouda Khandappa Gouda.

issue. On 6th July 1915, she adopted Gurunath the defendant in the present suit who died on 20th February 1933, subsequent to the High Court judgment. His legal representatives have been since brought on the record and they are now respondents 1 to 3. On 15th January 1913, Jivangouda died leaving his widow Bhimabai (plaintiff 2, now respondent 4) but without male issue. On 17th November 1919, she adopted the appellant who attained his majority on 5th March 1920. In December 1915, Nilkantgouda died leaving him surviving Dyamangouda II whom he had adopted as his son on 20th May 1915. Dyamangouda died in August 1919, leaving a son Dattatraya who was born in August 1918, and a widow Tungawa. On 6th February 1920, Dattatraya died unmarried and the appellant became entitled by survivorship to all the joint family properties subject to the rights of Tungawa and Bhimabai for maintenance. Tungawa took possession of the properties to the exclusion of the appellant.

Disputes, however, arose between Tungawa and Gurunath, the latter claiming that he was entitled to watan properties in preference to Tungawa. These disputes were referred to two arbitrators who made an award on 23rd February 1920, in terms of which a consent decree was afterwards passed by the First Class Subordinate Judge of Dharwar on 24th February 1920. On the same date, purporting to act under its terms Tungawa handed over the properties now in suit to Gurunath who has since been in sole and exclusive possession of them. Subsequently, Gurunath applied for mutation in his favour in the Revenue Records; a similar application had been made by the appellant also, who had by this time come of age on 5th March 1920. The Mamlatdar of Gadag ordered mutation in favour of Gurunath, but this order was set aside by the District Deputy Collector. Thereupon, on 25th November 1920, Gurunath filed a suit (Suit No. 588 of 1920) in the Court of the First Class Subordinate Judge of Dharwar against Bhimabai, the appellant, and some others challenging the adoption of the appellant, and praying for cancellation of the order of the District Deputy Collector, a declaration that he was in possession, and a permanent injunction restraining the defendants therein from dispossessing him and receiving rents from the tenants. On the same date, Gurunath filed an application for and obtained a temporary injunction to the same effect as the permanent injunction applied for by him. On 1st April 1921, Bhimabai and the appellant filed a written statement in which Gurunath's claim was denied and the title of the appellant was asserted. The order for temporary injunction was confirmed by the Subordinate Judge on 6th February 1922,

and by the High Court in appeal, on 22nd January 1924. The main contest in the case was as regards the validity of the appellant's adoption. The Courts in India held that his adoption was invalid, but on appeal to His Majesty in Council, the Board set aside their decision holding that the appellant was validly adopted by Bhimabai as a son to her husband Jivangouda : see the decision in 60 I. A. 25.¹ The Order in Council giving effect to the judgment was made on 10th November 1932. The appellant's title to the lands in question was thus definitely established.

Thereupon, on 25th November 1932, the appellant and Bhimabai, (as plaintiffs 1 and 2), brought the suit out of which this appeal arises, in the Court of the First Class Subordinate Judge of Dharwar against Gurunath, claiming possession of the suit properties on the strength of title established in the appellant's favour by the judgment of the Privy Council. Appellant 2, was subsequently brought on the record as plaintiff 3, on his own application on the ground that he was the donee of some of the properties. Various pleas were raised by Gurunath in his written statement of which the only one with which the board are now concerned is that the appellant's title to the suit properties was extinguished by reason of his adverse possession for over 12 years. The appellant contended first that the suit was in time alleging that the cause of action arose on 4th November 1932 or on 25th November 1920 (see para. 12 of the plaint). This plea has not been urged before the board; he also pleaded that even if the cause of action arose on an anterior date, the bar of limitation was saved because of ss. 14 and 15, Limitation Act. These sections run as follows :

"Section 14. (1) In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Explanation II.—For the purposes of this section, a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding."

Section 15, sub-ss. (1) and (2) run as follows :

"Section 15. (1) In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

(2) In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded."

The exclusion from the bar of limitation was pleaded in para. 18 of the plaint which stated as follows :

But if it were to be held that the cause of action accrued to the plaintiffs still earlier the plaintiffs submit that in computing the period of limitation prescribed for this suit the time from 25-11-1920 to 4-11-1932 should be excluded, on the ground inter alia firstly that the institution by them of any suit for possession and mesne profits or for recovery of rent, etc., was in effect continuously stayed first by the temporary injunction hereinbefore referred to and followed by a permanent injunction as embodied in the decree of this Court which was confirmed by the High Court; and secondly and without prejudice to the previous grounds that he was defending the said suit and prosecuting the said appeals, in effect prosecuting another suit founded upon the same cause of action, viz., the validity of his adoption with due diligence and in good faith against the defendant herein.

It will be observed, that the first part of this statement refers to S. 15, Limitation Act, and second part to S. 14. Meanwhile on 4th November 1935 the appellant and Bhimabai filed an application before the First Class Subordinate Judge under ss. 144 and 151, Civil P. C., praying for an injunction against Gurunath, for possession and mesne profits, damages, and compensation and other relief, by way of restitution consequent on the reversal of the decree of the trial Court, which they contended was the effect of the judgment of the Privy Council in 60 I.A. 25,¹ and the Order in Council dated 10th November 1932. In the suit the Subordinate Judge held that "time certainly began to run against the appellants from at least 24th February 1920," the appellant could not claim the benefit of either S. 14 or S. 15; and that his title was thus extinguished by the adverse possession of Gurunath; he therefore passed a decree dismissing the suit on 31st October 1935. The Subordinate Judge also dismissed the application dated 4th November 1935 on the following grounds :

"In view of the findings in the suit, that it was barred by time and adverse possession and the plaintiffs (applicants) have no right to the possession of the property, none of the reliefs prayed for survives."

On appeal to the High Court both the decree of the Subordinate Judge in the suit, and his order on the application were confirmed, and a decree dated 14th January 1938 was drawn up in each appeal, dismissing the same with costs in favour of Gurunath. In this appeal, the only question argued before the board is that which relates to limitation. Having regard to the findings, Sir Thomas Strangman, the learned counsel for the appellants conceded that the title of the appellant to the suit properties must be held to have been extinguished by adverse possession, if he is not able to show that in computing time the appellants

are entitled to claim the benefits of S. 14 or of S. 15, Limitation Act. With respect to S. 14 of the Act, it is urged that the appellants are entitled to deduct the period of the pendency of Suit No. 588 of 1920 which ended in the Privy Council in the appellant's favour, but the learned counsel has not been able to convince their Lordships how the words of S. 14 can be applied to the facts of the case, and at a very early stage in the arguments that contention was given up.

It is clear to their Lordships that S. 15 of the Act also cannot help the appellants. Having regard to the words of S. 15 the question to be considered is whether the institution of the suit the decree in which is now under appeal, has been stayed by any injunction or order; it is argued that the injunction passed in Suit No. 588/1920 and embodied in the decree prevented the appellant from filing a suit for possession, and therefore he is entitled to deduct the whole period from the date of the temporary injunction to the date of the dissolution of the permanent injunction by the Privy Council. In this connexion attention may be drawn to the injunction passed by the Subordinate Judge and also to the decree of the Court. In his application for temporary injunction made on 15th November 1920 Gurunath prayed as follows :

"The Court may therefore be pleased to issue an injunction restraining the defendants from taking away any crops whatever in the lands mentioned in Schs. A, B and C annexed hereto, from causing obstruction in the vahivat (management) of the plaintiff, from taking rent notes from the Plaintiff's ryots and recovering moneys (from them), from causing obstruction to plaintiff in taking away the crops raised by him, and in plaintiff's ryots taking away the crops raised by them, and from obstructing plaintiff in recovering the amount (rent) from his ryots."

On the same date, the Subordinate Judge granted ex parte, a temporary injunction, as prayed for. As already stated this was confirmed on 6th February 1922 and it continued until it was dissolved by the decision of the Privy Council. The decree passed by the Subordinate Judge in Suit No. 588/1920, after declaring the title of Gurunath to the properties, stated as follows :

"... We hereby order that defendants 1 to 5 either jointly or severally should not deprive the plaintiff of the possession of the whole of the property or any portion thereof, that they should not cause obstruction in any way to the plaintiff in removing the crops grown by him or in accepting or recovering the amount of rent of the said lands from the tenants of those (lands). We also order that they should neither accept nor recover the amount of the rent of the said lands in suit or of one thereof..."

The question whether in a particular case a party has been restrained by an injunction or order from instituting a suit must always depend for its decision upon the order, or the

decree, made in the case. It appears to their Lordships there is nothing in the injunction or in the decree to support the contention that the appellant was prevented from instituting a suit for possession in 1920, or at any time before the expiry of the period of limitation. The various restraints imposed on the appellant by the decree cannot be made to mean by any process of interpretation that he is thereby prevented from instituting a suit for possession for the suit properties. It is not maintained that there is any express order restraining him from instituting such a suit. Mr. Parikh, the learned counsel for the respondents, said that the injunction or order relied upon, to be effective should contain an express prohibition, but it is not necessary to consider that point as their Lordships are satisfied that there is no prohibition, either express or even implied in the injunction or the decree in the present case, which restrains the appellant from instituting a suit for possession. Sir Thomas Strangman contended strongly that since the title of the contending parties was involved in the suit it would be quite futile to institute a suit for possession. Their Lordships are unable to appreciate this point for the institution of a suit can never be said to be futile, if it would thereby prevent the running of limitation. For the above reasons their Lordships hold that the appellants' suit was barred by limitation, and also that the appellant was not entitled to restitution and other reliefs claimed by him in his petition under S. 144 and S. 151, Civil P. C. They will therefore humbly advise His Majesty that this appeal should be dismissed with costs of the contesting respondents.

R.K.

*Appeal dismissed.*Solicitors for Appellants — *T. L. Wilson & Co.*Solicitors for Respondents — *Harold Shephard.***A. I. R. (32) 1946 Privy Council 8***(From Bombay)***24th July 1944****LORD PORTER, LORD GODDARD AND
SIR MADHAVAN NAIR***Tungabai bhratar Purushottam Shamji
Kumbhojkav — Appellant*

v.

*Yeshvant Dinkar Jog and another —
Respondents.*

Privy Council Appeal No. 63 of 1942.

Contract Act (1872), S. 16 — Wife mortgaging all her property for benefit of husband — Wife illiterate — Husband in management of wife's property — Wife signing any document asked to sign — Presumption of undue influence held did arise — Creditor who had notice of facts held not in better position than husband.

It would not be true to say that there is a presumption of undue influence in every case where a

wife confers a benefit on her husband without consideration. Equally it is not necessary in order to establish the presumption that the parties should stand in some particular category of relationship to each other. The presumption can be more easily established and indeed may be assumed in such cases as transactions between parent and infant child, solicitor and client, or spiritual adviser and penitent, but it will arise in any case in which the facts show that the circumstances are such that influence can fairly be inferred : (1911) A. C. 120, *Foll.*

[P 9 C 2]

P, *T*'s husband, was heavily in debt; he had mortgaged all his own property and, being pressed for money had nothing to offer by way of security for a further loan other than his already encumbered estate. He approached *D*, his creditor, for a further loan of Rs. 7000 but the latter was unwilling to lend it either on the security of the husband's encumbered lands or on a promissory note. So the only security which could be offered was the wife's land. The wife *T* was quite illiterate; unable to read or write, but could sign her name. Her husband *P* managed the property entirely; she was a submissive wife, and if her husband told her to execute a document she did so at his bidding and without informing herself of the contents. *T*'s property brought Rs. 400 to 500 a year and on that the family had to depend. The wife *T* executed the mortgage deed for Rs. 7000 for *P*'s benefit and received nothing out of the amount herself.

Held that *T* was acting under the influence of her husband for whose benefit the mortgage was being executed. *D* the creditor, who benefited by the transaction had notice of the facts which raised the presumption and hence he was in no better position than *P* the person who exercised the influence: ('29) 16 A. I. R. 1929 P. C. 3 ; (1887) 36 Ch. D. 145 ; ('14) 1 A. I. R. 1914 Cal. 223 and (1934) 1 K. B. 380, *Rel. on.*

[P 9 C 2; P 10 C 1]

Held further that it was unnecessary to decide whether there was actual fraud by the husband; it was enough to show that the wife was acting under his influence and not as a free agent. Considering that he was at the end of his resources and that the income from the wife's property was all there was to support the family it was a most improvident thing to mortgage their only means of livelihood for the purpose of using at any rate a substantial portion of the money to pay off antecedent debts of the husband, and an action which no right-minded person ought to have entertained.

[P 10 C 1, 2]

*C. S. Rewcastle, and R. Parikh — for Appellant.
Respondents Ex parte.*

Lord Goddard.—The question that arises in this appeal is whether a mortgage deed executed by the appellant on 17th May 1926 whereby she mortgaged to Dinker Krishna Jog, deceased (hereafter called the plaintiff), now represented by respondent 1, all her landed property which had been left to her by way of "Stridhan" to secure a loan of Rs. 7000 is binding upon her. The Subordinate Judge at Belgaum held that it was not, and his decision on this point was reversed by the High Court of Bombay.

The plaintiff was a money-lender doing an extensive business and had made loans to the appellant's husband. The latter at the time of this mortgage was heavily in debt; he had

mortgaged all his own property and, being pressed for money had nothing to offer by way of security for a further loan other than his already encumbered estate. He approached the plaintiff for a further loan of Rs. 7000, but the latter was unwilling to lend it either on the security of the husband's encumbered lands or on a promissory note. So the only security which could be offered was the wife's land. The appellant was married to her husband some years ago at the age of 12, and is described by the Subordinate Judge as young in years and not very intelligent. She is quite illiterate; unable to read or write, but can sign her name. She has two children living, and her stridhan property, which brings in some Rs. 400 to 500 a year, is all that the family can depend on. Her husband managed the property entirely; she is evidently a submissive wife, and if her husband told her to execute a document she did so at his bidding and without informing herself of the contents. The plaintiff, who was an educated and keen business man admitted that he told the husband that he must have some letters from the appellant about the transaction, and accordingly four postcards were prepared and written by the husband to which the wife put her signature without knowing what was in them, and it would seem to be obvious that the plaintiff wanted them to strengthen his position should the transaction on which he was about to embark with the husband be called in question. He never saw her during the negotiations that he had with her husband, and according to him the only time he did see her was on the evening before the mortgage was executed, when he said he was in a hurry and that the business, of which it may be said she knew nothing, must be finished the next day. On 17th May, in the morning, the husband told the appellant to come with him to Chikodi. He told her that a lease was to be registered. They went to the house of one Raghavendra, who afterwards witnessed the mortgage, and here it was prepared, though not in the wife's presence. The plaintiff did not appear in the document as the mortgagee; it was taken in the name of one Damodar as benamidar or nominee for him. Then when the parties went before the Sub-registrar the money was produced and passed over by someone whom the plaintiff sent for that purpose. Whether the appellant actually handled the money is in dispute, but it is really immaterial. She never got the Rs. 7000; some of it was passed back to the plaintiff in discharge of the husband's outstanding debt, some to another creditor, and what balance there was the husband took.

The Subordinate Judge who heard and saw the witnesses was satisfied that the appellant

knew nothing of the nature of the transaction and simply did as she was told by her husband. He had always managed her property and she had passively acquiesced in what he did and signed whatever documents she was told to execute. On these facts the Subordinate Judge was satisfied that the appellant was throughout acting under the influence of her husband and without knowledge of the nature of the transaction. In the opinion of their Lordships, it is unnecessary to enter into a discussion as to the burden of proof in such a case as this as the evidence here abundantly justifies a presumption that she was acting under the influence of her husband for whose benefit the mortgage was being executed. The matter was elaborately discussed before this board in (1929) A. C. 127¹ and before the Court of Appeal in (1934) 1 K. B. 380.² The first of these cases related to a gift by an aunt, who was a feeble old woman, to a nephew who managed her property. The second was a case of a daughter who shortly after her marriage stood surety for her mother in an important money-lending transaction. In both cases it was held on a review of the evidence given that a presumption of influence was raised. In the former case Lord Hailsham in delivering the opinion of the board approved the judgment of Cotton L. J. in (1887) 36 Ch. D. 145³ at p. 171 where he divided the cases relating to influence into two categories; first where the Court is satisfied that the gift was the result of influence expressly used by the donee for the purpose, and secondly where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence on the donor.

It would certainly not be true to say that there is a presumption in every case where a wife confers a benefit on her husband without consideration. Equally it is not necessary in order to establish the presumption that the parties should stand in some particular category of relationship to each other. The presumption no doubt can be more easily established and indeed may be assumed in such cases as transactions between parent and infant child, solicitor and client, or spiritual adviser and penitent, but it will arise in any case in which the facts show that the circumstances are such that influence can fairly be inferred. This in the opinion of their Lordships was the foundation of the decision of the board in (1911) A. C.

1. (29) 16 A.I.R. 1929 P. C. 3 : 115 I. C. 733; 1929 A. C. 127 (P. C.), *Inche Noriah v. Shaik Allie Bin Omar*.

2. (1934) 1 K. B. 380, *Lancashire Loans Ltd v. Black*.

3. (1887) 36 Ch. D. 145, *Alleard v. Skinner*.

120.⁴ In that case a wife who was a confirmed invalid and who was found on the evidence to have no will of her own entered into an important transaction for the benefit of her husband. When giving evidence she appears to have somewhat indignantly denied that she was influenced by any pressure or that she acted otherwise than of her own free will to relieve her husband in distress. The board was of opinion that this evidence only showed how deeprooted and lasting the influence of the husband was. There was ample evidence to justify the finding of the learned Subordinate Judge in the present case and their Lordships agree with his finding on this matter. Their Lordships are also of opinion that when a third party who benefits by a transaction has notice of the facts which raise the presumption he is in no better position than the person who exercises the influence. This was expressly decided in (1934) 1 K. B. 380² and by the High Court of Bengal in 18 Cal. W. N. 1133⁵ and their Lordships agree with those decisions. Their Lordships entirely agree with the findings of the Subordinate Judge as to the plaintiff's knowledge and conduct and need not repeat his findings.

The High Court however in this case took a different view to that of the learned Subordinate Judge. It appears to their Lordships that the learned Judges directed their minds much more to the question of whether it had been proved that the plaintiff had been a party to a fraud committed by the husband than to what in their opinion is the true question in the case. It is unnecessary to decide whether there was actual fraud by the husband, it is enough to show that the wife was acting under his influence and not as a free agent. Nor can they agree with the criticisms of the High Court on the Subordinate Judge's findings as to the transaction being one into which a right-minded person would enter and as to its improvidence. It seems to have been assumed by the High Court that the husband required a loan to enable him to do business with some salt pans that he had taken from the Government. The evidence does not in fact anywhere support this suggestion; it seems much more probable that he required the money to stave off pressing demands. Considering that he was at the end of his resources and that the income from the wife's property was all there was to support the family it was a most improvident thing to mortgage their only means of livelihood for the purpose of using at any rate a substantial portion of the money to pay off

antecedent debts of the husband, and an action which no right-minded person ought to have entertained. Accordingly their Lordships will humbly advise His Majesty that the appeal should be allowed: that so much of the decree of the High Court as varied the decree of the Subordinate Judge and decreeing the plaintiff's suit as against defendant 1 and ordering her to pay the plaintiff the decretal amount with costs and interest be set aside and the decree of the Subordinate Judge on this matter be restored. The appellant should have her costs in the High Court, and such costs of this appeal as she is entitled to having regard to the fact that she has been given leave to appeal in *forma pauperis*.

R.K.

*Appeal allowed.*Solicitors for Appellant — *Harold Shephard.**Respondents Ex parte.***A. I. R. (32) 1945 Privy Council 10***(From Lahore : ('43) 30 A. I. R. 1943 Lahore 321)***27th July 1944**LORD PORTER, LORD GODDARD AND
SIR MADHAVAN NAIR*Shambhu Nath Shivpuri — Plaintiff—
Appellant*

v.

*Pushkar Nath and others — Defendants
— Respondents.*

Privy Council Appeal No. 39 of 1943.

Advancement—Presumption of, in India — No presumption in favour of wife — Same rule applies to other relations — Contrary intention — Question is one of fact.

The deposit by a Hindu of his money in a bank in the joint names of himself and his wife and on terms that it is payable to either as survivor does not on his death constitute a gift by him to his wife. There is a resulting trust in his favour in the absence of proof of a contrary intention, there being in India no presumption of an intended advancement in favour of a wife: ('28) 15 A. I. R. 1928 P. C. 172, *Rel. on.* [P 11 C 1, 2]

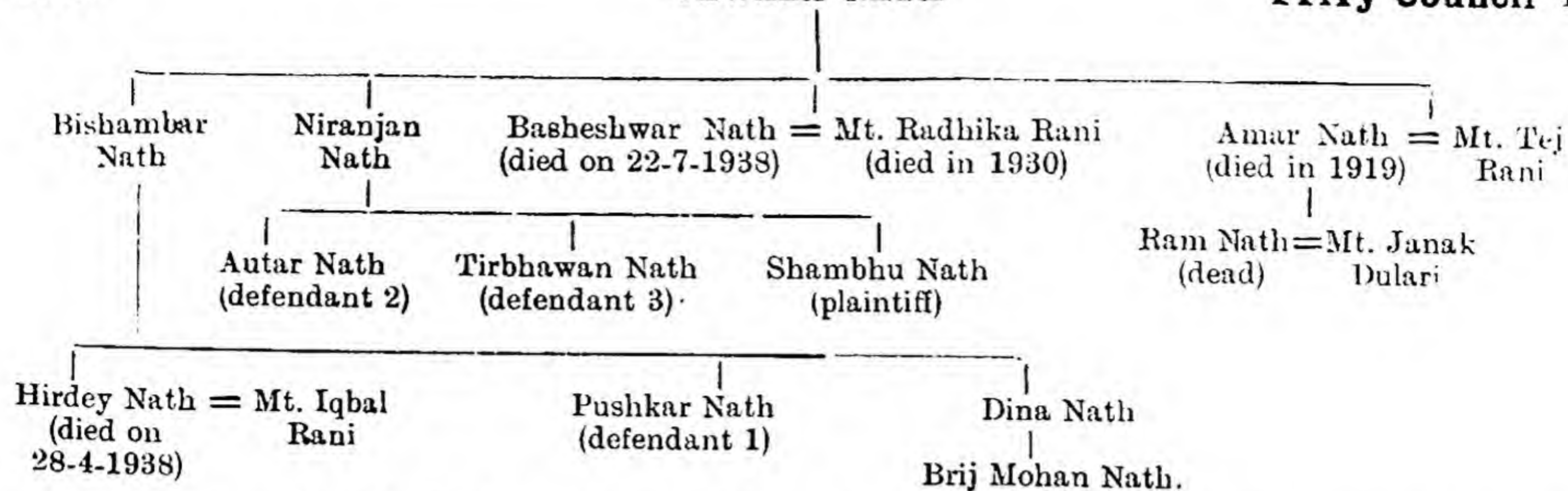
The rule is not confined to assets in the joint names of the deceased man and his wife. It is of universal application whatever the property and whatever the relationship. The question of contrary intention is one of fact. [P 11 C 2]

[The deposits were held for advancement and that those whose names were used were not merely nominees.]

*Charles Bagram — for Appellant.**Robert Ritson — for Respondents.*

Lord Porter. — This is an appeal from a decree of the High Court at Lahore, dated 15th May 1942, which modified in favour of respondent 1 a decree of the Subordinate Judge of Delhi. The suit was initiated for the partition of the estate of Pandit Basheshwar Nath Shivpuri who had recently died. The appellant is one of his nephews. There were four defendants, and the relationship of the parties one to the other is shown by the table following:

4. (1911) 1911 A. C. 120, *Bank of Montreal v. Stuart.*5. ('14) 1 A.I.R. 1914 Cal. 223 : 23 I. C. 401 : 18 C. W. N. 1133, *Badiatannessa Bibee v. Ambika Gharan Ghosh.*



Defendant 4, Pran Kishori, was a niece (the daughter of the deceased man's wife's sister).

Among the assets left by the deceased were the following: (1) Fixed deposit receipt of the Central Bank of India, Ltd., for Rs. 48,500, in the joint names of the deceased and defendant 1. (2) Ditto for Rs. 7000 in the joint names of the deceased and defendant 2. (3) Five postal cash certificates of Rs. 1000 each, in the joint names of the deceased and defendant 2. (4) Four ditto, in the joint names of the deceased and one Hirdey Nath, elder brother of defendant 1, then deceased. (5) Hundred shares in the Central Bank of India, Limited, value Rs. 3130-4-0, in the joint names of the deceased and defendant 1. (6) Fixed deposit receipt of the Punjab National Bank, Ltd., for Rs. 4000, in the joint names of the deceased and defendant 4. (7) Rs. 279-10-6 in the Home Saving Safe Account of the Central Bank of India, Ltd., in the joint names of the deceased and defendant 1. (8) Rs. 450 in cash (spent on funeral expenses). (9) A pucca house No. 1550—Ward No. 9, in Delhi.

As appears from this list, certain of the assets were held in joint names and the question which their Lordships have to determine is whether the learned Subordinate Judge was right in saying that these assets were nevertheless the absolute property of the deceased man at the time of his death or whether his object was that they should be so held for the advancement of those whose name was joined with his in the several instances. The first Court held that all the joint holdings stood in the names of the parties to the suit as nominees except that in the name of defendant 4 Pran Kishori. The High Court agreed in the last result but held that all the joint holdings like hers were for the advancement of those whose names were joined with that of the deceased and should be excluded from the partition. The law in India in this matter is not in doubt and is authoritatively stated by their Lordships in 55 I. A. 235¹ in the words

"the deposit by a Hindu of his money in a bank in the joint names of himself and his wife and on terms

that it is payable to either as survivor does not on his death constitute a gift by him to his wife. There is a resulting trust in his favour in the absence of proof of a contrary intention, there being in India no presumption of an intended advancement in favour of a wife."

The rule however is not confined to assets in the joint names of the deceased man and his wife. It is conceded that it is of universal application whatever the property and whatever the relationship. It was common ground therefore before their Lordships that it was for respondent 1 to establish a contrary intention. If he succeeded in doing so he kept the assets standing in the joint names of the deceased and himself. If not, those assets must be included in the partible property. Respondent 1 and Pran Kishori had maintained in the original suit as they did throughout that the property in the cases in which their names were to be found had become theirs, the other members of the family contended that it must all be included in the partition. The question is one of fact and so far as Pran Kishori is concerned has been decided in her favour by concurrent findings in two Courts. No appeal is taken from this part of the decision, but it was strenuously argued that no sufficient evidence had been given to discharge the ordinary rule in the case of respondent 1.

It was said in the first place and truly said that no plea of advancement had been put forward by him either in his written statement or in argument in the Court of the Senior Subordinate Judge: the contention was that the deceased had either made an out-and-out immediate gift or that there had been a *donatio mortis causa*, and that neither contention had been established. The Subordinate Judge so found, the High Court agreed with him and their Lordships take the same view. The changes which the deceased made in the names associated with his from time to time and the fact that the interest was directed to be paid and was paid to him sufficiently establish that there was no immediate gift. The evidence that the assets or the titles to them were handed over to the persons in whose joint names they stood is unsatisfactory and was not accepted by the Subordinate Judge and the evidence that when the joint names

1. (28) 15 A.I.R. 1928 P. C. 172 : 55 I. A. 235 : 55 Cal. 944 : 109 I. C. 723 (P.C.), Guran Ditta v. Ram Ditta.

were inserted the deceased man had any immediate expectation of death is open to the same criticism. Is there then evidence of an intention to advance? It cannot be fatal to such an argument that the true legal position was not recognised in the first instance or adopted before the Subordinate Judge, and it is not suggested that any further evidence could have been given or if given would have affected the result. It was open, therefore, for the High Court to consider the evidence as a whole and for their Lordships to appraise the correctness of their conclusion.

The High Court in the first place was influenced by its view that the relations between the deceased and respondent 1 and his branch of the family were closer than those with the appellant and his branch. It is true that there is some evidence both ways, but their Lordships agree with the High Court that the evidence taken generally does establish the closer relationship of which the High Court speaks. But it is in his dealings with the assets that the intention of the deceased to provide advancement for his relatives and not merely to use their names as nominees is said to be found. It is pointed out that in the first instance, whilst his wife was alive, the deceased man invested his money in the names of himself and his wife. When she died he kept his money in his own name for three or four years. Thereafter he began transferring his investments into the names of his various relatives, beginning with the appellant's branch, in whose names jointly with his own he put comparatively small sums. At this time, however, he owned a valuable house which he is said originally to have intended to transfer to respondent 1's branch, but delayed to do so as the government were going to acquire it.

The government purchase was ultimately completed in February 1937, and the compensation money received in July 1937. The bulk of this money was at once transferred to respondent 1's elder brother Hirdey Nath, two other sums added later and a little later still Rs. 4000 deposited in the joint names of the deceased and Pran Kishori. Hirdey Nath died childless on 28th April 1938, leaving a widow Iqbal Rani, and four days later the deceased wrote to the bank to renew the three deposits standing in the joint names of himself and Hirdey Nath and transfer them to the joint names of himself and respondent 1. Pran Kishori may be considered separately, but it is observable that in the case of the two family branches, the property was put in the names of the eldest brother's sons, and when Hirdey Nath died transferred to the name of the eldest brother's surviving son. As the High Court point out the persons chosen as joint names,

combined with the transfers from one to the other, suggest that the deposits were made not benami but for advancement.

The dealings with the various sums are most readily traced in an analysis furnished to their Lordships' Board by the appellant's representatives which shows one instance of transfer from respondent 1's branch to the appellant's branch of a sum of Rs. 4000 at a time when the deceased began to make the smaller deposits in the name of the latter and three deposits in the joint names of the deceased together with (1) Mt. Tej Rani, widow of his deceased brother, Amar Nath; (2) Mt. Janak Dulari, widow of that deceased brother's son; and (3) Pran Kishori, above mentioned. Their Lordships agree with the High Court in thinking that the deceased would have been unlikely to choose destitute widows as joint holders of property if their names had been made use of as nominees only. In their view the number of the nominees, the transfers from one name to another, the fact that some were pardanashin ladies, unable and unfit to deal direct with the banks, and that the absence at times of the male depositors in distant parts of India all lead to the inference that the deposits were for advancement and that those whose names were used were not merely nominees.

Two other matters were, however, argued before their Lordships which were said to lead to the inference that the names were benami only. Firstly, it was said that two postcards written to Autar Nath, the one on 13th July 1931, and the other on 26th September 1933, showed an intention by the deceased man to divide his property amongst his nephews equally. Both undoubtedly show affection for Autar and a desire to benefit him. The first contains the statement :

"All that I possess I have to give away to all of you, who are dear to me. There is no one dearer to me in the world than you,"

and the second expresses a desire to deposit Rs. 5000 in joint names of the deceased and Autar, and a like sum in the names of the deceased and Hirdey Nath. It may be that at that time and to that extent the deceased wished to benefit his nephews alike but the earlier letter speaks of "giving," which is inconsistent with the recipients being nominees, but not with the deposits being for their advancement. Secondly, the appellant relies upon a document which was prepared on 6th August 1938, fifteen days after the deceased man's death. It is said to be an agreement to divide up the property equally or at any rate to acknowledge that it is so divisible. Stress is laid upon the statement contained in it. "The following articles . . . belonging to Pandit Basheshwar

Nath Shivpuri were found after his death." And there follows a list containing inter alia the assets in question. Later it says that the respective joint holders will for the present keep the holdings standing in their names and continues :

"In October 1938, when Autar Nath and Shambhu Nath will return from Simla, we, Pushkar Nath, Autar Nath, Tirbhawan Nath, Shambhu Nath and Brij Mohan Nath will divide Rs. 59,500, bank shares, ornaments, other articles, etc., according to our respective legal rights amongst ourselves privately."

Like the High Court, their Lordships do not think much importance can be attached to the description of the assets as belonging to the deceased man. They had belonged to him and might not unnaturally be so described whether they had been intended for advancement or not. Moreover, the undertaking to divide the Rs. 59,500, bank shares, ornaments, other articles, etc., according to the respective legal rights is at least not inconsistent with a contention that they were not divisible in equal shares. Apart from this, it appears in evidence that the parties were at issue as to whether such of the estate as was divisible was to be divided per stirpes or per capita and were ignorant as to whether Brij Mohan was entitled to a share. In such circumstances they might well desire to postpone the distribution until the legal rights of the parties were ascertained, and it is consistent with this view that after taking legal advice respondent 1 claimed the assets standing in his name as his own. In their Lordships' opinion this document carries the matter no further. Like the High Court they think the evidence and circumstances point to an intention on the part of the deceased man to advance the joint holders and will therefore humbly advise His Majesty to dismiss the appeal. The appellant must pay defendant 1's (respondent's) costs.

R.K. *Appeal dismissed.*

Solicitors for Appellant — *Hasties.*

Solicitors for Respondents — *H. S. L. Polak & Co.*

A. I. R. (32) 1945 Privy Council 13

(*From Allahabad*)

24th July 1944

LORD PORTER, LORD GODDARD AND
SIR MADHAVAN NAIR

Raja Jwaleshwari Pratap Narain Singh
— Appellant

v.

Babu Parchand Bir Singh —
Respondent.

Privy Council Appeal No. 59 of 1942; Allahabad Appeal No. 15 of 1940.

(a) Deed—Construction—Will—On testator's death his eldest son *A* to succeed to testator's Raj—Testator's younger son *B* to be maintained by *A* — If *B* wished to separate and live sepa-

ately *A* to allot to *B* property yielding monthly income of Rs. 400 — Income of villages to be allotted held should be calculated as at date of partition taking into account any remissions of rent by Government.

The Raja in his will directed that on his death his eldest son *A* should succeed to the entire properties of his Raj and continue to support the Raja's younger son *B* as before and meet all his reasonable needs. If *B* wanted to become separate and live separately *A* should give to *B* property yielding Rs. 400 per month as profits. The will went on to direct that *A* should separate such property from his management and place it in charge of *B* who should be responsible for Government revenue and zamindari matters and that *B* might on removal of the name of the Raja for the time being have his name recorded in the khewat. Before the time when *B* separated from *A*, certain rents payable by the tenants of the villages of the Raj had been remitted by the Government under S. 73, Agra Tenancy Act, and further remissions were made after the date of the partition. *A* claimed that in allotting villages to answer the provisions of the will, the income should be calculated as if the original rents stood and no remissions had been made, whereas *B* contended that the income must be calculated as at the date of the partition, and that a rise or fall or the possibility of a future rise or fall in the rents after that date would not diminish or increase *A*'s obligation :

Held that the provisions of the will clearly indicated that property which at the date of the partition yielded an actual income of Rs. 400 a month was to be transferred by *A* to *B* the former taking the risk of a future rise and the latter of a further remission of rents. [P 15 C 2]

(b) Privy Council — Appeal — New point.

Having regard to the practice of the Privy Council and the terms of O. 45, Rr. 1 to 5, Civil P. C., a point which was not taken in the grounds of appeal to the Privy Council cannot be raised at the hearing of the appeal before the Privy Council. [P 15 C 1]

S. P. Khambatta — for Appellant.

W. Wallach — for Respondent.

Lord Porter. — This appeal seeks to reverse a decree of the High Court of Judicature at Allahabad dated 24th January 1940, which in part affirmed and in part modified a decree of the Court of the Subordinate Judge of Basti dated 1st June 1936. The parties are sons of the late Raja Pateshwari Pratap Singh who was proprietor of Raj Basti and died on 19th March 1928. The Rajah made his will on 16th July 1927, and after summarising the state of his family, states that by way of a precautionary measure he considers it desirable to make proper arrangement for the maintenance allowance to his two younger sons, the respondent and Babu Bijai Bir Singh, as follows :

"After my death Lal Jwaleshwari Pratap Narain Singh my eldest son shall be the Raja for the time and the absolute owner of the entire moveable and immovable property appertaining to Basti Raj. He shall continue to support as heretofore and meet all reasonable needs of his two brothers Babu Parchand Bir Singh and Babu Bijai Bir Singh so long as the latter two Babu Sahebs live in agreement with Lal Jwaleshwari Pratap Narain Singh and act for the betterment and improvement of the raj as desired by the latter. When the Babu Sahebs aforesaid or one of the babus do not want to work and look after the

management under the orders of Lal Jwaleshwari Pratap Narain Singh or if, for some reason they want to become separate and live separately they shall be entitled to babuai rights subject to all the conditions relating to the property of Babus all along obtaining to this estate and it shall be the duty of Lal Jwaleshwari Pratap Narain Singh to give property yielding Rs. 500 per mensem as profits, i. e., Rs. 6000 per annum for the maintenance of his two brothers as per detail given below. He should separate such property from his management and place it in charge of the Babus aforesaid who shall be responsible for payment of Government revenue and other zamindari matter in respect of the property aforesaid."

He then proceeds to provide for the male descendants of his sons and for the construction of a residence for his younger sons. The will then proceeds as follows :

"In view of the fact that for various reasons I could not make proper arrangements for the education and future maintenance of Babu Parchand Bir Singh, I have considered it proper and have after full consideration come to the decision that in addition to the babuai rights of maintenance mentioned above, property yielding Rs. 100 per mensem as profits should further be allotted to him subject to all the conditions of babuai rights. I hereby direct that when Babu Parchand Bir Singh separates, Lal Jwaleshwari Pratap Singh should give him property yielding profits to the extent noted above. At the time of allotment of this property also, all the conditions relating to the selection of property as mentioned above should be borne in mind. I have, therefore, executed these few presents by way of a will so that it may serve as evidence and be of use when required.

Written on 16th July 1927.

Detail of maintenance allowance amounting to Rs. 500 per mensem which comes to Rs. 6000 per annum.

Babu Parchand Bir Singh—Rs. 300 per mensem.

Babu Bijai Bir Singh — Rs. 200 per mensem."

At the date of the will and at his death the testator had three sons, the appellant, the respondent and Babu Bijai Bir Singh. The last-named is joined merely as a formal party interested under the will and is not otherwise concerned in these proceedings. Differences having arisen between the parties, the respondent separated from the appellant in 1934 and the respondent thereupon claimed from the appellant the sum of Rupees 2500 mentioned in the will and in effect a decree awarding possession over such villages as would yield an income of Rs. 400 a month. No point arises as to the Rs. 2500, but the appellant contended that he was liable to give possession of property producing Rs. 300 a month only. A further dispute arose between the parties which turned upon the effect of S. 73, Agra Tenancy Act — Act 3 of 1926, the Act which was applicable at the date of the partition. That section enacts,

"when for any cause the local government or any authority empowered by it, remits or suspends for any period the payment of the whole or any part of the revenue payable in respect of any land a collector . . . may order that the rents of the tenants holding such land or any portion thereof . . . shall be remitted or suspended for the period of such re-

mission or suspension of payment of revenue to an amount which shall bear the same proportion to the whole of the rent payable in respect of the land as the revenue of which payment has been so remitted bears to the whole of the revenue payable in respect of the land."

The exact date at which the parties separated does not appear in the record but it does appear that certain remissions of rent had been made before the date of the partition and that further remissions were made after that date. The appellant claimed that in allotting villages to answer the provisions of the will, the income should be calculated as if the original rents stood and no remissions had been made, whereas it was held by the High Court and is contended by the respondent in this appeal that the income must be calculated as at the date of the partition, and that a rise or fall or the possibility of a future rise or fall in the rents after that date will not diminish or increase the respondent's obligation.

In order to secure the rights which the respondent claimed were his he instituted the present suit on 9th April 1934, in forma pauperis in the Court of the Subordinate Judge of Basti. In that suit the learned Subordinate Judge delivered judgment on 1st June 1936, and issued a decree against the appellant holding that the respondent was entitled to have possession of certain properties of the value of Rs. 4800 a year, but in directing the properties which were to be taken the learned Subordinate Judge calculated the income to be derived from them as if no remissions had been made under the provisions of S. 73, Tenancy Act of 1926. Both parties appealed from this decree, the respondent claiming that the remissions made under the Act should have been taken into consideration and that the properties from which the income was to be derived must be of the value of Rs. 400 a month as at the date of partition, even though the rental had at that time been reduced. The appellant on the other hand maintained, as he had maintained below, that the respondent was entitled to possession of lands producing Rs. 300 a month only and that the rental value must be calculated as if no remissions had been made. Both appeals were from the same decree but were separate appeals separately brought: the question at issue in the one was different from that in the other, different relief was sought and different grounds of objection given. The appellant's appeal was numbered 228 of 1936 and the respondent's 276 of the same year. One judgment only was pronounced in the two appeals. In the result the appellant's appeal (No. 228 of 1936) was dismissed with costs, that of the respondent (No. 276 of 1936) allowed and the order of the Civil Judge modified. In the latter appeal a separate decree was pro-

nounced and it was ordered that the decree of the Subordinate Judge be modified and that a decree should be passed in favour of the respondent for the recovery of Rupees 10,293-0-0 together with interest at the court rate, and that in so far as the claim for possession was concerned the case should be remanded to the Court of the Subordinate Judge with direction to give the respondent after investigation a decree for possession of property which in 1934 yielded an actual income of Rs. 400 a month and to base the income upon actual realisation after making provision for remissions. It was further ordered that if the respondent had already realised any sum in execution of his decree, the appellant should be credited with that amount and with Rs. 1,000 in respect of collecting charges. The respondent was also given a stated sum for costs.

The question of the amount per mensem to which the respondent is entitled under the terms of the will is one of some difficulty and if it were open to the appellant would require careful consideration by the Board. But their Lordships do not think it is open. They would point out that the only application for leave to appeal is against the decree in the First Appeal No. 276 of 1936 that paras. 3, 4 and 5 of the petition are as follows :

"3. That the plaintiff filed appeal. First Appeal No. 276 of 1936 in this Court against that portion of the decree which awarded him possession over 7 villages only on the ground that the trial Court should have taken into consideration the fact, the remissions of rent had taken place and therefore the net income of the villages decreed was less than Rs. 4,800 a year.

4. That the Court decreed the plaintiff's appeal and directed that a decree be given to the plaintiff over villages which after taking into account the remissions yield a net income of Rs. 4,800 a year.

5. That the value of the subject-matter of the suit in the Court of first instance and the value of the subject-matter in dispute on appeal to His Majesty in Council is upwards of Rs. 10,000, that the decree sought to be appealed from, does not affirm the decree of the Court below and that the appeal involves substantial questions of law."

Moreover, the grounds of appeal are solely concerned with the question of the remissions and no complaint is made or reversal sought of the decree which dismissed the appellant's appeal and awarded Rs. 400 and not Rs. 300 a month to the respondent. In these circumstances having regard to the practice and the terms of O. 45, Rr. 1 to 5, Civil P. C., their Lordships do not think that this point is open to the appellant or that they would be justified in permitting it to be raised. Accordingly they would dismiss the appellant's appeal in this matter.

So far as the remissions are concerned, the will specifically states that if the respondent or his brother wish to become separate or live

separately they should be entitled to babuai rights and it should be the duty of the appellant to give property yielding Rs. 500 per mensem for the maintenance of the two brothers "as per detail given below." The will goes on to direct that the appellant should separate such property from his management and place it in charge of the respondent and his brother who should be responsible for government revenue and zamindari matters and that the babus might on removal of the name of the Rajah for the time being have their names recorded in the khewat. At a later stage the will contains the provision for an additional Rs. 100 a month to be given to the respondent in addition to the sum of Rs. 300 out of the 500 per mensem allocated to him.

In their Lordships' view, this language clearly indicates an intention on the part of the testator that the amount of income which the property to be given would produce was to be calculated with reference to the date at which the separation took place. If there were any doubt in the matter it would, in their Lordships' opinion, be resolved by the terms to be found later in the will where it is said that the testator and the appellant intend to settle certain villages set out below according to the Agra Estate Act, that for this reason it was not possible to apportion any particular property for the babus, that the testator entrusted this duty to the appellant who might out of the property of the Raj set apart property yielding profits to the extent noted below, when any of the babus separate. Their Lordships cannot read these provisions in any other sense than that the property was to be separated when the respondent should elect to live separately and the income which it would yield was to be ascertained at the moment of separation.

It was argued on behalf of the appellant that remissions were temporary only and the revenue and rental might at any future time be increased to its original amount and that in that case the respondent would gain an unjustified and unintended increase of income, beyond that specified in the will. Without pronouncing an opinion on this matter, and assuming it to be true that the rental might be increased at some future time to its original figure, their Lordships hold the provisions of the will clearly to indicate that property which produces the specified income at the date of the separation is to be transferred—the appellant taking the risk of a future rise and the respondent of a further remission. The obligation is not simply to provide an income of Rs. 400 a month, but to transfer property producing that income. In default of any other indication their Lordships are of

opinion that this means property producing that income at the date when the duty to transfer arises. In their Lordships' view the decree of the High Court is right and should be confirmed with a slight modification for clarity's sake only. They will accordingly humbly advise His Majesty that there is no appeal before them as to the question whether under the terms of the will the respondent is entitled to property producing an income of Rs. 300 a month only and not to property producing Rs. 400 a month and that no relief can be granted to the appellant in this respect. They will further humbly advise His Majesty that the appellant's appeal be dismissed with costs save that there be substituted in the wording of that decree the words "property which at the date of the partition (9th April 1934) yielded an actual income of Rs. 400 a month" in the place of the words "property which in 1934 yielded an actual income of Rupees 400 a month." The appellant must pay the costs of the appeal.

G.N.

*Appeal dismissed.*Solicitors for Appellant — *T. L. Wilson & Co.*Solicitors for Respondent—*H. S. L. Polak & Co.***A. I. R. (32) 1945 Privy Council 16***(From Nagpur)*

27th July 1944

LORD PORTER, LORD GODDARD AND
SIR MADHAVAN NAIR*Mt. Kesarbai and another — Appellants*
v.*Indarsingh alias Ishwarkumar —**Respondent.*

Privy Council Appeal No. 30 of 1943.

Hindu law — Adoption — Custom — Raghubansi in Chhindwara district—Custom of adoption without authority held proved.

A custom in the Raghubansi caste that a widow can adopt a son to her deceased husband, without his authority held proved in Chhindwara district in Central Provinces : ('23) 10 A. I. R. 1923 P. C. 90, *Rel. on*; ('29) 16 A. I. R. 1929 Bom. 57, *Ref.*

[P 16 C 1]

Sir Thomas Strangman and W. Wallach —

for Appellants.

C. S. Rewcastle and J. Chinna Durai —

for Respondent.

Lord Goddard.—The only question raised in this appeal is whether it has been proved that there is a custom in the Raghubansi caste, to which both parties belong, that a widow can adopt a son to her deceased husband, without his authority. The burden of proof was admittedly on the respondent, who was the defendant in the suit. The District Judge at Chhindwara held that the custom was not proved; his judgment was reversed by the High Court at Nagpur, who dismissed the plaintiffs' claim, and ordered the plaintiffs

to place the defendant in possession of the property to which as an adopted son he was entitled.

The facts are that one Atalsingh, a member of the above mentioned caste who lived in the Chhindwara district of the Central Provinces died in 1918 leaving a widow but no issue. The widow remained in possession of his property till her death in June 1937. In August 1935 the widow adopted the defendant and an adoption deed was duly registered before the Sub-Registrar on 24th August of that year. In the deed the widow stated that her husband had empowered her to adopt any boy according to her own desire at any time, to continue his name. When the widow died the plaintiffs who are the sisters and reversioners of Atalsingh endeavoured to take forcible possession of the property; a riot ensued and the natural father of the defendant was murdered, a matter which might well discourage persons from coming forward to give evidence. When the riot took place the police intervened and placed a Receiver in possession under S. 145, Criminal P. C. Thereupon the plaintiffs brought this suit claiming a declaration that they were entitled to all the property left by the widow and that the defendant had no title or interest therein. As their Lordships are of opinion that the judgment of the High Court in favour of the defendant should be affirmed they do not think it necessary to discuss whether the form of action was technically correct and there was no argument on the point. In their written statement the material allegations made by the plaintiffs were that there had been no adoption in fact of the defendant by the widow and that the adoption, if any, was void because no authority had been given to the widow by her deceased husband to adopt a son. In his first written statement the defendant besides asserting the fact of his adoption, relied only on the allegation that the widow had been authorised by her husband to adopt a son, but afterwards he obtained leave to amend and then set up that there is a custom of the caste that a widow can adopt a son to her deceased husband without his permission or authority. The issue of authority was decided against him in both Courts and no more need be said about it.

It appears from works of authority cited in the judgment of the High Court that the Raghubansis are a class of Rajputs of impure descent. They appear to have originally emigrated from Ayodhya in Oudh and to have found their way not only to the Central Provinces but the Gwalior territory, the Kandish district of Bombay, Bhopal and other places. Originally it is not disputed that they were

governed by the law of the Burans (Mitakshara) School under which a widow could not adopt without authority. In some parts of India, it is clear that they have departed from the strict orthodoxy of the Benares school; the High Court quote from the Nagpur Settlement Report of Sir Reginald Craddock in which he says that their religion is unorthodox and they have gurus or priests of their own caste, discarding Brahmans, and in 50 I. A. 179¹ which related to a family in the district of Sitapur in Oudh, and to which further reference will be made hereafter, a finding of the very custom that is in question in the present appeal was upheld by their Lordships' Board. Now the evidence of the custom which was rejected by the trial Judge and accepted by the High Court was that, among others, of five malguzars residing in different villages and three different districts. Other witnesses came from other villages in two different districts. They were for the most part men of some standing and position, and their Lordships cannot but agree with the learned Judges of the High Court when they say:

"We see no reason why these persons important and influential in their own ways and scattered over such wide areas should all combine to give false evidence against the plaintiffs."

They were all quite firm in their evidence that this custom did exist in their caste. Between them they gave some 12 specific instances and a further one was referred to by a pleader who was called on behalf of the plaintiffs. It is true that in none of the 12 cases referred to by the defendant's witnesses could the witnesses say definitely that no authority had in fact been given by the deceased husband whose widow had adopted; but the striking fact is that in only one of the cases, even where the matter had been referred to the panchas, was it ever suggested that there might have been a lack of authority. This is certainly remarkable and points to the fact that the custom was so notorious that no one thought of challenging it. As the High Court said when dealing with the Case No. 7, relating to one Bhoorasingh

"knowing how keenly these cases are contested on every conceivable and inconceivable ground it is remarkable that we find case after case in which this plea was not taken."

The one instance in which it is said to have been raised is No. 3, relating to Daryaosingh. Two witnesses were called, one of them deposed that the question of authority was raised before the panchas, while the other said that the only issue decided was that the widow could adopt anyone provided he was of the same community. Both witnesses agree that the

latter was what the panchas actually decided. The second witness was not cross-examined as to whether it was the only issue raised, but, in any case, the adoption seems to have been strenuously contested and, if anything could have been made of the adoption having taken place without authority, it is most unlikely that it would not have been raised. It may be that the panchas thought that the custom was so well-known that they did not trouble to refer to it when giving a decision. The plaintiffs' evidence with one exception was of a purely negative character; the witnesses simply said that they knew of no such custom as was alleged but they gave no instance where there had been a successful challenge of a widow's right to adopt without authority, nor as the High Court point out did they call any of the leaders of their community who could speak with authority to disprove the custom, in spite of the fact that the defendant had called persons of considerable influence and position to support it.

The exception was the evidence of a pleader, one Vijai Singh. He is a member of the caste and deposed that he had never heard of the custom. But he did not, as he said in examination in chief, live in his community. He would not therefore be likely to know of its particular customs, especially when it is remembered that adoption in this caste is in any case rare. But though he did not know of any custom of widows being able to adopt without the authority of their husbands he did know of two cases where it had been done. The highest he could put it was that in one of these cases the adoption was disputed on that ground and his father was asked to settle the matter. His father then asked how the parties (or more probably the objecting party) knew that there was no authority and advised them not to quarrel, and apparently the person about whom the dispute arose is still regarded as an adopted son. This evidence is quite negative and does not help one way or the other; it is quite consistent with the learned pleader's father having taken up the very sensible attitude of saying in effect, "Well even assuming that your objection is good how are you going to prove it?"

The principal attack which has been made on the High Court's judgment is that the learned Judges misunderstood and paid far too much attention to the case before this Board in 50 I. A. 179¹ which has been mentioned above. Sir Thomas Strangman's argument was that as it is firmly established that migrants carry with them the law applicable to them at the time of migration and as it is conceded that originally in Oudh the caste was governed by the Benares School prima

1. ('23) 10 A.I.R. 1923 P. C. 90 : 26 O. C. 228 : 50 I. A. 179 : 73 I. C. 244 (P.C.), Bishwa Nath Singh v. Jugal Kishore.

facie they are still governed by it. Therefore the fact that one portion of the caste settled round Sitapur have deviated from that school is no evidence that those in the Central Provinces have also deviated. He further contends that the case in question related only to a particular family custom and not to that of a caste. In their Lordships' opinion it is clear that the evidence in that case related not to the custom of a particular family but to the custom of the caste in the locality where the family lived. The custom affected the family because it was the caste custom in that locality. This appears from the fact that the evidence mainly relied on was contained in the "wajib-ul-arzes" of eight villages, in four of which no member of the family in question resided or owned property. The High Court did not treat that case as binding them to find that this custom prevailed throughout the entire caste wherever they might be found. Had it been binding there would have been no more to be said. What they did was to regard the case as showing that the custom did prevail among certain members of the caste, that it prevailed in Oudh whence the caste originally came and that it was therefore reasonable and of long standing. To that extent it also afforded corroboration of the defendant's witnesses as showing that the custom to which they deposed was known and practised by other members of their community in a different part of India. The case in 53 Bom. 242² is in no way in conflict with the Privy Council decision nor does it assist the plaintiffs. It decided no more than that it was not proved that this custom obtained among those members of the caste who were settled in Kandish in the Bombay Presidency, and Murphy J. pointed out the difference in certain customs which prevailed among those of the caste settled in Oudh and the Central Provinces from those prevailing among them in Kandish. The learned trial Judge evidently took an unfavourable view of the defendant's case from the outset as is shown from the note of his decision on the application of the defendant to have additional witnesses examined on commission and on his application for an amendment of pleadings made on 24th September 1938. He obviously thought that the allegation as to custom was a mere after-thought and in their Lordships' opinion he did not give the weight to the evidence which it deserved. They consider that the fully reasoned judgment of the High Court is more satisfactory; no error of law can be attributed to it and their Lordships accordingly are not prepared to differ from the conclusion at which that

2. ('29) 16 A. I. R. 1929 Bom. 57 : 53 Bom. 242 : 114 I. C. 379, Babu Motising v. Durgabai.

Court arrived. They will humbly advise His Majesty that the appeal should be dismissed with costs.

R.K.

Appeal dismissed.

Solicitors for Appellants — *T. L. Wilson & Co.*

Solicitors for Respondent—*Hy. S. L. Polak & Co.*

*** A. I. R. (32) 1945 Privy Council 18**
(From Lahore)

17th October 1944

LORD CHANCELLOR (VISCOUNT SIMON),
LORDS PORTER, SIMONDS AND GODDARD
AND SIR MADHAVAN NAIR

Emperor

v.

Khwaja Nazir Ahmad — Respondent.

Privy Council Appeal No. 55 of 1943.

(a) Penal Code (1860), Ss. 417 and 420—Offences under—Distinction.

The vital difference between the offences under Ss. 417 and 420 is that whereas an offence against the latter section is a cognizable one, that against the former is non-cognizable and investigation of it can only be undertaken by the police on the instructions of a Magistrate, whereas in the other case the police can act on their own motion under Ss. 154 and 156, Criminal P. C. [P 19 C 1]

(b) Criminal P. C. (1898), Ss. 154, 156 and 157 — Cognizable offence—Receipt and recording of first information report is not condition precedent to criminal investigation.

In the case of cognizable offences, receipt and recording of a first information report is not a condition precedent to the setting in motion of a criminal investigation. No doubt in the great majority of cases, criminal prosecutions are undertaken as a result of information received and recorded in this way, but there is no reason why the police, if in possession through their own knowledge or by means of credible though informal intelligence which genuinely leads them to the belief that a cognizable offence has been committed, should not of their own motion undertake an investigation into the truth of the matters alleged. Section 157 when directing that a police officer, who has reason to suspect from information or otherwise that an offence which he is empowered to investigate under S. 156 has been committed shall proceed to investigate the facts and circumstances supports this view. [P 20 C 1]

(c) Criminal P. C. (1898), Ss. 154 and 155 — First information report — Provisions as to — Object of—Report can be put in evidence.

The object of the provisions as to an information report (commonly called a first information report) is to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be forgotten or embellished, and the report can be put in evidence when the informant is examined if it is desired to do so. [P 20 C 1]

(d) Evidence Act (1872), Ss. 40 to 43—Findings in civil proceeding are not binding in subsequent prosecution founded upon similar allegations — Criminal Court must form its own view.

The findings in a civil proceeding are not binding in a subsequent prosecution founded upon the same or similar allegations. It is the duty of a criminal Court when a prosecution for a crime takes place before it to form its own view and not to reach its

conclusion by reference to any previous decision of the civil Court which is not binding upon it.

[P 22 C 1]

* (e) Criminal P. C. (1898), Ss. 561A, 154 and 156—Cognizable offence—Police have statutory right under Ss. 154 and 156 to investigate offence—High Court cannot interfere in exercise of inherent powers under S. 561A—Interference can be made only when charge is preferred before Court.

Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India there is a statutory right on the part of the police under Ss. 154 and 156, to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court under S. 561A. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course subject to the right of the Court to intervene in an appropriate case when moved under S. 491, Criminal P. C., to give directions in the nature of habeas corpus. In the case of a cognizable offence, the Court's functions begin when a charge is preferred before it and not until then and, therefore, the High Court can interfere under S. 561A only when a charge has been preferred and not before. As the police have under Ss. 154 and 156, a statutory right to investigate a cognizable offence without requiring the sanction of the Court to quash the police investigation on the ground that it would be an abuse of the powers of the Court would be to act on treacherous grounds: ('16) 3 A.I.R. 1916 P. C. 64, *Rel. on.* [P 22 C 1, 2]

No doubt if no cognizable offence is disclosed, and still more if no offence of any kind is disclosed the police would have no authority to undertake an investigation and if they do so the High Court may interfere under S. 561A: ('38) 25 A.I.R. 1938 Mad. 129, *Approved.* [P 22 C 2]

(f) Criminal P. C. (1898), S. 561A—Object and scope of.

It is not correct to say that S. 561A has given increased powers to the Court which it did not possess before that section was enacted. The section gives no new powers, it only provides that those which the Court already inherently possess shall be preserved and is inserted, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code and that no inherent power had survived the passing of the Criminal Procedure Code. [P 22 C 2]

(g) Criminal P. C. (1898), Ss. 197, 154 and 156—Prohibition under S. 197 is against Court—Police can investigate cognizable offence without sanction under S. 197—Question of sanction arises when charge is preferred.

The prohibition contained in S. 197 against a prosecution without the necessary sanction is against the action by any Court. Under Ss. 154 and 156 the police have a statutory right to investigate a cognizable offence without the sanction of any Court and, therefore, no sanction under S. 197 is necessary for an investigation by the police into a cognizable offence.

The question of sanction under S. 197 will arise only when a charge is preferred before a Court and the Court's functions begin. [P 21 C 2; P 22 C 2]

G. D. Roberts, W. Wallach and B. McKenna —
for the Crown.

C. S. Rewcastle and S. A. Kyffin —
for Respondent.

Lord Porter. — This appeal is brought from a judgment and order of the High Court of Judicature at Lahore dated 24th October 1941 (Criminal Revision Side). The question raised is stated, and their Lordships think correctly stated, in the case presented by the respondent to be whether the High Court had power, under S. 561A, Criminal P. C., to quash all proceedings taken in pursuance of two first information reports. The complainant in each case was one S. M. Saleh: the earlier report was made on 31st August 1941, and the later on 5th September of the same year. The offence in the first is stated to be in breach of S. 420, Penal Code. The facts are set out in a loose and slovenly manner and condescend on little exact detail. The result is that it is at least doubtful whether the offence should not have been described as committed in breach of S. 417 instead of section 420: the vital difference between the two being that whereas an offence against the latter section is a cognisable one, that against the former is non-cognisable and investigation of it can only be undertaken by the police on the instructions of a Magistrate, whereas in the other case the police can act on their own motion under Ss. 154 and 156, Criminal P. C.

However this may be, and however the offence may be described in the report itself, their Lordships are satisfied that there can rightly be spelt out of it an offence against S. 409, which is also a cognisable offence and possibly also one against S. 420. Apart from this, the later report though again it condescends upon rather meagre particulars, plainly indicates an accusation of an offence against S. 409 and the offence is so described. In their Lordships' view therefore both information reports charge the accused man with cognisable offences under which the police are entitled to inquire without a Magistrate's order. Their Lordships think it right to set out these matters because it was strenuously argued before them on behalf of the respondent that the only accusation of which account could be taken was that contained in the first of the two reports, that the offence there charged was a non-cognisable offence and therefore the police were precluded under S. 155, Criminal P. C., from inquiring into it without a Magistrate's order.

The argument as their Lordships understood it was that the only information report

under ss. 154 to 156, Criminal P. C., was that recorded on 31st August 1941, that the allegations recorded at a later stage of 5th September were not an information report, but a statement taken in the course of an investigation under ss. 161 and 162 of the Code, that there was therefore no reported cognisable offence into which the police were entitled to enquire, but only a non-cognisable offence which required a Magistrate's order if an investigation was to be authorized. Their Lordships cannot accede to this argument. They would point out that the respondent in his case treats each document as a separate information report and indeed, on the argument presented on his behalf, rightly so, since each discloses a separate offence, the second not being a mere amplification of the first, but the disclosure of further criminal activities. But, in any case, the receipt and recording of an information report is not a condition precedent to the setting in motion of a criminal investigation. No doubt in the great majority of cases, criminal prosecutions are undertaken as a result of information received and recorded in this way but their Lordships see no reason why the police, if in possession through their own knowledge or by means of credible though informal intelligence which genuinely leads them to the belief that a cognisable offence has been committed, should not of their own motion undertake an investigation into the truth of the matters alleged. Section 157, Criminal P. C., when directing that a police officer, who has reason to suspect from information or otherwise that an offence which he is empowered to investigate under s. 156 has been committed shall proceed to investigate the facts and circumstances, supports this view. In truth the provisions as to an information report (commonly called a first information report) are enacted for other reasons. Its object is to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be forgotten or embellished, and it has to be remembered that the report can be put in evidence when the informant is examined if it is desired to do so.

As has already been pointed out, the respondent himself speaks of two information reports in the case presented for their Lordships' consideration. Though the High Court in their judgment discussed the question whether the only crime formally disclosed was not cognisable and if so whether the investigation based upon the information report of 30th August should not be quashed, they gave no decision on the matter, saying only that it raised a difficult point of law which they found it unnecessary to decide. They then proceeded to determine the point at issue upon other

grounds which are those raised in the cases presented to their Lordships. These it is now necessary to discuss.

It appears that S. M. Saleh was the son of Sheikh Rahmatullah who died in 1924 and that some time after his death disputes arose between his children including S. M. Saleh as to the partition of his property. In this dispute arbitrators were originally appointed but their authority to act was afterwards withdrawn. One of the assets was a business which had been carried on by the father and after his death was continued by the wife and children as a single partnership concern according to the respective shares in the property left by the deceased man, and in 1937 a suit was begun by Saleh against his brothers and sister for partition of the family property and for dissolution of the partnership and rendition of accounts. The respondent is the Special Official Receiver of the High Court, Lahore, and was in that capacity appointed on 17th August 1937, as Receiver in this suit. The criminal charge which the police were investigating concerns his activities in the receivership and his alleged behaviour in seeking the appointment. According to Saleh he was persuaded by the respondent by means of various fraudulent representations to undertake the suit and to ask that the respondent should be appointed Receiver of the property. If this story is true there is no doubt but that Saleh was a party to an appointment made for the purpose of overreaching his brothers and sister. At a later stage, however, Saleh became dissatisfied with the activities of the respondent as Receiver and on 27th June 1939, applied to have him removed from the receivership and supported his application by an affidavit sworn on 9th June. The grounds of the application were substantially the same as those put forward in the two information reports as criminal acts calling for a prosecution.

The Subordinate Judge refused to accede to the application, but the Receiver voluntarily resigned and Saleh and one of his brothers S. A. Mannan were appointed in his place. In order to clarify the position however, the Subordinate Judge, a short time afterwards, viz., on 30th August 1939, directed the respondent to continue in possession of certain property, the subject-matter of the suit, notwithstanding that he had ceased to be Receiver. From these two orders Saleh appealed to the High Court which on 4th April 1940, dismissed the appeal with costs observing :

"It appears that the charges are baseless and that no loss attributable to the conduct of Khwaja Nazir Ahmad can be shown. The charges it is clear from the record have been made recklessly and without any attempt to examine the history of the case, a proper consideration of which would have prevented

any reasonable person from using such terms as fraud and dishonesty. It is most improper that such charges should be made without any justification."

The next step appears to have been taken by one K. L. Gauba, a barrister who had represented Saleh in certain of the proceedings. This gentleman on 7th August 1941, made a written complaint to a District Magistrate charging the respondent with a number of crimes and amongst others referred to the charge made by Saleh and enclosed his client's affidavit of 9th June 1939, in support of his application for the dismissal of the respondent from his receivership. The District Magistrate made an order for investigation into the charges and under this order the respondent's records were seized by the police on 27th August. Thereupon the respondent petitioned the High Court on 28th August 1941, for their release and for stay of the investigation on the ground that he was a public servant within the definition of the Penal Code, and therefore under s. 197, Criminal P. C., exempt from interference by any Court without the previous sanction of the Government. A day later the Crown presented a petition to the Court of Sessions Judge, Lahore, for revision of the Magistrate's order, asking that the record might be forwarded to the High Court under s. 438 of the Code with a recommendation that the proceedings might be quashed as being void ab initio having been held without jurisdiction, and that pending the final decision of the petition by the High Court further proceedings might be stayed and the Senior Superintendent of Police, Lahore, ordered not to take any further action by way of investigation.

It appears that some application was also made by the respondent to the then Chief Justice who on 28th August sent a telegram to the District Magistrate ordering him to stop all proceedings until further orders from the Chief Justice and to return all records immediately which had been taken by the police. The District Magistrate acted in accordance with the instructions contained in the telegram and issued the necessary orders to the police who complied with them. Thereupon, Mr. Gauba filed a revision petition against the order of the District Magistrate staying further proceedings. Both matters came before the learned Sessions Judge who felt that he was bound by the order of the then Chief Justice and on 3rd September stayed further proceedings, and forwarded the revisions to the High Court to be disposed of at the same time as the connected revision already pending there.

Meanwhile Saleh had lodged the two information reports already referred to and as a result the police again demanded the papers

which they had originally seized under Mr. Gauba's complaint and began an investigation into the crimes alleged. The immediate consequence was a further petition by the respondent submitting that the registration of the information report of 31st August and the proceedings taken on it were illegal and unwarranted by law and requesting the High Court to order the Magistrate to direct that the books should be returned by the police and that the investigation might be stayed and depend upon the result of the petition filed by Mr. Gauba. An interim stay was granted during the vacation and the hearing before the High Court took place on 24th October 1941. Two matters were then considered, firstly the Court's right to take cognizance of Mr. Gauba's petition which was opposed by both the respondent and the Crown and in respect of which there were cross petitions asking that the proceedings be quashed, and secondly what, if any, order should be issued by way of interfering with the investigation begun by the police on Saleh's information reports.

As to the first, the High Court held that the matters complained of by Mr. Gauba concerned the action of the respondent in his official capacity as Receiver and therefore that he being a public servant not removable from his office without the sanction of the local government, and having been accused of an offence as such public servant, s. 197, Criminal P. C., precluded any Court from taking cognizance of the offence without the previous sanction of the Government having power to order his removal. They accordingly dismissed the complaint and quashed the order of the District Magistrate. In that case Mr. Gauba had petitioned the Court. The prohibition contained in s. 197 is against action by any Court and in these circumstances the decision of the High Court was accepted and its order is not the subject of any appeal. The action of the police in investigating Saleh's charges is a different matter. The position in and time at which a Court is required to take cognizance of the matter has not yet been reached and the only question arising upon this part of the case or discussed before their Lordships is whether the Court which in its inherent jurisdiction under s. 561A, Criminal P. C., has power to make such orders as may be necessary to prevent abuse of the process of the Court or otherwise secure the ends of justice, is, in the present case justified, in using their powers to quash the police investigation.

The High Court decided that it was entitled to quash the proceedings and prohibit the investigation. Their grounds appear to have been that similar charges were levelled against the respondent four years earlier. Some of

these charges they said were then actively disproved and the rest held to be unfounded in an enquiry held as a consequence of the application to remove the respondent from his post of Receiver of the property. In those and in these proceedings as the High Court points out Saleh accused himself of having been a party to a corrupt conspiracy to defeat the ends of justice. The Judges appear to have made a careful examination of the previous record, to have come to the conclusion that Saleh's evidence was unacceptable, and to have searched the records of the police investigation until it was stopped, in order to see if any information beyond that contained in the earlier proceedings was forthcoming. In the result they found none. All this may be good ground for a rejection of Saleh's accusation and a dismissal of any prosecution launched upon his information if such a prosecution ultimately takes place and if the Court are then satisfied that no crime has been established. But that stage has not been reached. It is conceded that the findings in a civil proceeding are not binding in a subsequent prosecution founded upon the same or similar allegations. Moreover, the police investigation was stopped and it cannot be said with certainty that no more information could be obtained. But even if it were not it is the duty of a criminal Court when a prosecution for a crime takes place before it to form its own view and not to reach its conclusion by reference to any previous decision which is not binding upon it.

In their Lordships' opinion however, the more serious aspect of the case is to be found in the resultant interference by the Court with the duties of the police. Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own

function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under S. 491, Criminal P. C., to give directions in the nature of habeas corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it and not until then. It has sometimes been thought that S. 561A has given increased powers to the Court which it did not possess before that section was enacted. But this is not so. The section gives no new powers, it only provides that those which the Court already inherently possess shall be preserved and is inserted, as their Lordships think, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code, and that no inherent power had survived the passing of that Act. No doubt, if no cognizable offence is disclosed, and still more if no offence of any kind is disclosed, the police would have no authority to undertake an investigation and for this reason *Newsam J.* may well have decided rightly in *A. I. R. 1938 Mad. 129*.¹ But that is not this case.

In the present case the police have under Ss. 154 and 156, Criminal P. C., a statutory right to investigate a cognizable offence without requiring the sanction of the Court, and to that extent the case resembles *44 Cal. 535*² in which as the High Court has pointed out their Lordships Board expressed the view that to dismiss an application on the ground that it would be an abuse of the powers of the Court might be to act on treacherous grounds. Of course, in the present case as in the petition brought by Mr. Gauba no prosecution is possible unless the necessary sanction under S. 197, Criminal P. C., has first been obtained. But that stage like the stage at which the Court may legitimately intervene has not, in their Lordships' opinion, yet been reached. The question so far is one of investigation, not prosecution. In accordance with their view, their Lordships will humbly advise His Majesty that the appeal should be allowed the decree and order of the High Court quashed and the investigation permitted to proceed.

G.N.

Appeal allowed.

Solicitors for the Crown—*Solicitor, India Office.*
Solicitors for Respondent — *Speechley, Mumford & Craig.*

1. ('38) 25 A. I. R. 1938 Mad. 129 : 173 I. C. 14, M. M. S. T. Chidambaram v. Shanmugam Pallai.
2. ('16) 3 A. I. R. 1916 P. C. 64 : 44 Cal. 535 : 44 I. A. 11 : 39 I. C. 788 (P. C.), Chhatrapat Singh Dagar v. Kharag Sing Lachmiram.

A. I. R. (32) 1945 Privy Council 23*(From Allahabad)*

17th October 1944

LORD PORTER, LORD GODDARD AND
SIR MADHAVAN NAIR*Lala Man Mohan Das — Appellant*

v.

*Janki Prasad and others—Respondents.*Privy Council Appeal No. 10 of 1942; Allahabad
Appeal No. 33 of 1938.

(a) Trust—Co-trustees—One of trustees cannot act alone.

In England as well as in India in the case of co-trustees the office is a joint one. Where the administration of the trust is vested in co-trustees, they all form as it were but one collective trustee, and therefore must execute the duties of the office in their joint capacity. It is not uncommon to hear one of several trustees spoken of as the acting trustee but the Court knows no such distinction; all who accept the office are in the eyes of the law acting trustees. If any one refuse or be incapable to join, it is not competent for the others to proceed without him, but the administration of the trust must in that case devolve upon the Court. The act of one trustee done with the sanction and approval of a co-trustee may be regarded as the act of both. But such sanction or approval must be strictly proved. Therefore the transfer of the idol's property executed by one only of the trustees of the idol cannot bind the idol: (15) 2 A.I.R. 1915 Cal. 33, *Approved*. [P 28 C 1]

(b) Transfer of Property Act (1882, as amended in 1929), S. 92, Para. 3—Subrogation—Meaning of — Conventional or contractual subrogation—Principle of.

The doctrine of subrogation is in essence a simple matter. It means the substitution of one creditor for another. The right mentioned in S. 92 referred to usually as "conventional or contractual" subrogation is founded upon the principle of an agreement between a borrower and a lender, that the lender shall be subrogated to the rights of the original creditor.

[P 28 C 2; P 29 C 1]

(c) Transfer of Property Act (1882, as amended in 1929), S. 92, Para. 3 — Stranger lending money to mortgagor to redeem mortgage when can claim subrogation — Law before and after amendment indicated — Stranger held not entitled to subrogation as amount not lent to mortgagor — Nor could he recover amount lent from mortgagor on equitable principles even though mortgage property had benefited thereby.

To entitle one to invoke the equitable right of subrogation under the Act as it stood before the amendment of 1929, he must either occupy the position of a surety of the debt, or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security or must stand in such a relation to the mortgaged premises that his interest cannot otherwise be protected. Thus, a mere stranger who had lent money to the mortgagor to redeem the mortgage and who was neither a surety of the mortgage debt nor interested in the property had in order to succeed on the equitable doctrine of subrogation to prove that there was an agreement between him and the debtor or creditor that he should receive and hold an assignment of the debt as security: 2 I. A. 131 (P.C.) and (40) 27 A.I.R. 1940 P. C. 38, *Rel. on*. [P 29 C 2; P 30 C 1]

After the amendment of the Act, the right of subrogation can be claimed by the lender under

S. 92 para. 3 only if the mortgagor has by a registered instrument agreed that he shall be so subrogated. The right can no longer be claimed or granted as before, on very slight evidence or what may be described as the semblance of an agreement.

[P 30 C 1]

In 1926 A who was one of the trustees of an idol mortgaged to B certain property belonging to the idol along with his brother and his son claiming the property as their own family property. In the whole of the mortgage deed, there was no mention that the idol had any rights in the property although the necessity for the loan was said to be to avoid the sale of the property in execution of a mortgage decree against the idol. But it was stated that the property had to be safeguarded as it was likely to prove beneficial to the family and the minor and not to the idol. In cl. (8) of the mortgage deed it was stated that the creditor shall have all powers and rights of sale by auction which the mortgagee decree-holder had under the mortgage decree in satisfaction of which the property had been advertised for sale:

Held that (1) the document by its terms did not purport to mortgage the interest which the idol had in the property and therefore any interest which the idol had in the property could not be proceeded against by the creditor;

[P 27 C 2]

(2) the creditor B in order to claim subrogation under S. 92 para. 3 had to prove that the money had been advanced to the mortgagor. The creditor had failed to prove that as the money was advanced not to the idol (mortgagor) through its trustees but to A personally who could not by himself represent the idol. Nor could the agreement in cl. (8) of the mortgage deed give the creditor B a right of subrogation under S. 92 para. 3 as at best it was only an agreement by a single trustee and not by all the trustees so as to make it binding on the idol;

[P 29 C 1]

(3) nor could the creditor claim subrogation under the Act as it stood before the amendment of 1929 as there was no agreement between him and the mortgagor idol or the mortgagee decree-holder giving him that right. The mere fact that the money borrowed from him was used for paying off previous mortgage did not entitle him to the benefit of the discharged security;

[P 30 C 1]

(4) it was not in every case in which a man had benefited by the money of another that an obligation to repay that money arose. The question was not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It was well settled that there was no such obligation in the case of a voluntary payment by one person of another's debt. The creditor therefore could not recover the amount lent from the idol on general principles of justice and equity even though the idol had got the property freed from liability with the aid of the creditor's money because there was no obligation express or implied on the idol to repay: 2 I. A. 131 (P.C.), *Rel. on*.

[P 30 C 1]

Sir Thomas Strangman and A. G. P. Pullan —
for Appellant.

C. S. Rewcastle and W. Wallach —
for Respondents.

Sir Madhavan Nair.—This is an appeal from a decree of the High Court of Judicature at Allahabad dated 16th September 1938 which reversed a decree of the Court of the Subordinate Judge at Allahabad dated 18th August 1934 and dismissed the plaintiff's suit with costs. The plaintiff—the appellant before the

board — is a money-lender, and the appeal arises out of a suit instituted by him as a mortgagee of the suit property on a mortgage dated 4th December 1926 executed by defendants 1 to 3 — respondents 1 to 3 in this appeal. These defendants did not contest the suit. In the plaint, Janki Prasad, defendant 1, was described as

"for self and as the 'mutwalli', manager and 'karkun' of Thakurdwara Sri Behariji Mahraj, installed in the temple situate in Mohalla Sarai Mir Khan, City Allahabad."

As this description did not say whether the deity, Sri Behariji Mahraj — hereinafter referred to as the deity or the idol — was or was not a party to the suit, and whether the plaintiff wanted a decree against Sri Behariji Mahraj, defendant 4, now respondent 4, Sri Behariji was made a party through the Receiver appointed by the District Judge in suit No. 14 of 1932, a suit which had been filed by the plaintiffs in suit No. 85 of 1927, under S. 92, Civil P. C., to have Janki Prasad (respondent 1) and Gopi Nath removed from the mutwalliship of the idol. Attention will be drawn in the course of this judgment to these two suits. The original plaint was subsequently amended by the addition of para. (7) (A) which is as follows:

(7) (A) "That Janki Prasad, defendant 1, did not in the mortgage deed sued on, write himself as the 'mutwalli', manager and 'karkun', of the Thakurdwara of Sri Behariji Mahraj installed in the temple situate in Mohalla Sarai Mir Khan, even then as the amount of consideration of the mortgage deed was paid for the protection of the property of Sri Behariji Mahraj, defendant 4, and as defendant 1 is the 'mutwalli', manager 'karkun' of Sri Behariji Mahraj it is also binding on the Thakurdwara of Sri Behariji Mahraj installed in the temple situate in Mohalla Sarai Mir Khan, City Allahabad, Sri Behariji Mahraj has been made a party to the suit."

Later, on 22nd February 1934, the plaint was further amended alleging that defendants 1 to 3 (respondents 1 to 3) were the owners of the property in suit. A written statement was filed by the Receiver on behalf of the idol. Therein it was stated that Janki Prasad (respondent 1) could not and did not properly safeguard the interests

"of the idol; that the mortgage is not binding on the idol as it was executed by Janki Prasad as the owner of the property; that assuming there was a debt binding on the idol, Janki Prasad and other trustees were bound to pay it out of the income of the trust property which was sufficient to pay for the debt;" and that the property of the idol was not in danger of being sold nor could it be sold in execution.

The main question in this appeal is, whether on the facts herein set forth the appellant is entitled to a mortgage decree which will be binding on the idol, respondent 4. The facts giving rise to this litigation may be summarised as follows: In 1865, one Jagannath died

childless leaving his widow Lalti Bibi and two items of properties, referred to in the suit as Nos. 14 and 15. Property No. 14 is the subject-matter of the suit mortgage. It consisted of four shops in Chowk Allahabad. In 1894, Lalti Bibi applied to the Allahabad Municipality for permission to reconstruct item No. 15 as a temple. The permission was granted. On 15th July 1895 she mortgaged property No. 14 for Rs. 3000 to reconstruct the temple. On 7th July 1903 Lalti Bibi executed a "will" by which she dedicated certain properties including property No. 14 to the idol, Sri Behariji Mahraj, and appointed executors and trustees for the purpose of carrying out the objects mentioned in the "will". The "will" recited that she had been empowered by her husband to make the dedication of the properties. On 4th March 1907, she executed another "will" similar in terms to the first, but appointing different executors and trustees, namely, Janki Prasad (respondent 1), Gopi Nath, and Jugal Kishore. Janki Prasad was appointed managing trustee. The "will" stated that she had received the properties by right of inheritance from her husband, that she had constituted the idol the owner of the properties after her death, and that none of the managers should deal with the properties for their own purpose or benefit. On 11th July 1907 Lalti Bibi mortgaged the property No. 14 for Rs. 4000 to another idol, Sri Thakurji through its managers, including one Kishan Lal and Janki Prasad, and paid off the mortgage of 15th July 1895. On 25th November 1908, Lalti Bibi died.

On 19th July 1913 the Secretary of State for India instituted suit No. 95 of 1913, in the Court of the Subordinate Judge at Allahabad against Mukandi Lal, the father of Janki Prasad, and Janki Prasad, claiming the properties left by Jagannath on the ground that he had left no heirs, and that on the death of his widow, the properties were escheat to the Crown. In that suit, Janki Prasad filed a written statement claiming that he is "the mutwalli, manager and supervisor" of the property in dispute which comprised Nos. 14 and 15, and that the idol is the "owner" of the properties. Mukandi Lal denied the plaintiff's claim; he stated that his grandmother was the "daughter of the uncle" of Jagannath, that other relations were alive, and that he was not liable to mesne profits. The trial Court passed on 22nd March 1915 a decree in favour of the plaintiff, but that decree was set aside by the High Court on appeal, on 28th January 1919 on the ground that the Secretary of State had failed to prove that there were no heirs. On 11th July 1919, Sri Thakurji instituted suit No. 141 of 1919, in the Court of the Subordinate Judge at Allahabad against the idol, res-

pondent 4, through its managers Janki Prasad (respondent 1), Gopi Nath and Jugal Kishore claiming Rs. 8033-6-6 as due on the mortgage dated 11th July 1907 and sale of the property on failure to pay the money. It is noticeable that though Janki Prasad was sued as representing the idol, he stated that his father Mukandi Lal was the owner of the property; he also stated that the mortgage is not binding on the idol under any circumstance. On 30th June 1920, the Subordinate Judge passed a preliminary decree for sale. On 30th May 1923, the High Court in appeal No. 41 of 1921, upheld the decision of the Subordinate Judge observing in the course of the judgment that "It is somewhat difficult to understand the position taken by defendant 1 in this case, that is to say, it is not at all clear under what title defendant 1 is laying claim to the property which was mortgaged." The grounds of the High Court's decision were as follows:

"There is no proof of any 'will' executed by Jagannath in favour of the defendants (appellants) and it follows, therefore, that the only title which they can show to the property now sought to be rendered liable for the mortgage debt is the 'will' executed by Lalta Bibi. That being so, they are bound to discharge the mortgage."

On 8th May 1924, a final decree for sale was passed for Rs. 12,043-10-0 by the Subordinate Judge. During the pendency of the suit, Jugal Kishore had died, and by the time of the final decree Gopi Nath, the other trustee, had apparently ceased to act. During the pendency of the appeal, both Mukandi Lal and Janki Prasad carried on litigations in one case up to the High Court, against a tenant of the property for arrears of rent; for the purposes of this appeal, it is sufficient to say that the claim of Janki Prasad was ultimately disallowed while that of Mukandi Lal was upheld on the grounds that Lalta Bibi had no right to make a "will" and that Mukandi Lal was Jagannath's heir.

On or about 1st January 1926, Mukandi Lal died, and on 30th March 1926, his sons, Janki Prasad and his brother, Brij Mohan, instituted suit No. 54 of 1926 in the Court of the Subordinate Judge at Allahabad against Sri Thakurji for a declaration that the decree in suit No. 141 of 1919 was null and void as against their right of ownership of the four shops and that the property in dispute was not saleable in execution of the decree passed in the said suit. The suit was dismissed on 20th August 1926. On 1st November 1926, a proclamation in suit No. 141 of 1919 was passed for the sale of the four shops on 9th December 1926. Then, on 4th December 1926, Janki Prasad approached the appellant for a loan on a mortgage of the suit property to pay off the decretal amount. The parties to the deed were Janki Prasad, his brother Brij Mohan,

and the latter's minor son—respondents 1 to 3 in the present appeal: the security consisted of the four shops (the suit property): the consideration was Rs. 14,500 of which Rs. 13,958-13-6 were left with the appellant for payment to the decree-holder: the balance was accounted for by the cost of the stamp, certain payments for house tax and repairs and a sum of Rs. 168-9-6 paid to the mortgagors in cash. Payment to the decree-holder was duly made, the actual amount being Rs. 13,949-14-7 of which Rs. 402-8-0 was refunded. The appellant advanced the money under the deed after taking legal advice. The deed recited the death of Lalta Bibi in 1908 and then proceeded as follows:

"After her death Mukandi Lal our father remained in possession by right of inheritance. After the death of Lala Mukandi Lal, we, the executants, have been in proprietary possession and occupation of the house property aforesaid. The debt aforesaid in satisfaction of which the above mentioned house has been advertised for sale was incurred under a mortgage deed executed by Mt. Lalta Bibi aforesaid and the amount of the mortgage deed had been held to have been borrowed for lawful and valid expenses by the Hon'ble High Court at Allahabad in first appeal No. 41 of 1921. The liability of the debt aforesaid has been laid on the house sought to be sold by auction. It is, therefore, very necessary to pay this amount in order to safeguard the property which is likely to prove beneficial to the family and to the minor."

Clauses 2, 5 and 8 of the deed were as follows:

"(2) We shall repay in full the entire amount of this mortgage-deed, the principal along with interest in five years."

"(5) For the satisfaction of the creditor and in order to secure payment of the amount of this mortgage-deed, the principal along with interest, we have mortgaged without possession house No. 14 aforesaid, comprising four shops specified as given below, without the exception or omission of any right or thing together with its site and all the rights and interests appertaining to the house aforesaid, held by us at present or which we might acquire in future, which does not stand hypothecated or pledged to anyone other than under the decree mentioned above in satisfaction of which it has been advertised for sale and which is free from all sorts of charges and claims of others. We shall not mortgage or transfer in any other manner the mortgaged property noted below to anyone till payment in full of the amount of this mortgage-deed. If we do so, it shall be invalid in face of this document."

"(8) The creditor shall have and shall continue to have all powers and rights of sale by auction which the decree-holder in suit No. 41 of 1921 aforesaid has in satisfaction of which the property has been advertised for sale."

"Suit No. 41 of 1921" in cl. (8) is a slip for appeal No. 41 of 1921 that being the appeal against the decree in suit No. 141 of 1919.

On 27th July 1927, Kishan Lal and others as "worshippers of the temple" of the idol instituted suit No. 85 of 1927 in the Court of the Subordinate Judge at Allahabad against respondent 1 and Gopi Nath, the surviving trustees of the idol and its properties, for a

declaration that properties Nos. 14 and 15 be declared a wakf property belonging to respondent 4 (the idol) and that the defendants are trustees. In para. 2 of the plaint, it was set out that respondent 1 now claimed the property and denied it to be wakf property belonging to respondent 4. Respondent 1 filed a written statement in which he stated, amongst other pleas, that he was not in possession of the properties under any trust, nor was the property wakf. He said this was so, as a result of the decision in suit No. 95 of 1913, the suit by the Secretary of State for India—and of the litigations carried on by his father against tenants by which the wakf created by Lalta Bibi became infructuous, and the whole property went into the possession of Mukandi Lal on whose death he and his brother succeeded to it. The Subordinate Judge held that it was not shown that Jagannath had given authority to his wife to create a trust and that therefore the property was not trust property. On 11th May 1932, the High Court on appeal held that Lalta Bibi had made the wakf on the authority of her husband, that the property was validly dedicated by her to the idol as a public endowment and that respondent 1 and Gopi Nath had become validly appointed trustees. The decree of the Subordinate Judge was accordingly set aside. Against this decree an appeal was filed in the Privy Council and on 5th March 1936, was dismissed for want of prosecution.

Meanwhile, on 16th July 1932, the appellant, the mortgagee, filed the suit (O. S. No. 47 of 1932) which has given rise to this appeal. Evidently, when the High Court gave its judgment on 11th May 1932, holding that the dedication of the property was valid, he must have considered it was high time to file a suit to recover his money. To complete the narrative, their Lordships must refer to two more litigations. On 8th December 1932, Brij Mohan (respondent 2, brother of respondent 1) instituted suit No. 83 of 1932 in the Court of the Subordinate Judge at Allahabad against Kishan Lal and three others—plaintiffs in Suit No. 85 of 1927—for a declaration that the property in Suit Nos. 14 and 15 was his personal property; respondent 1 was added as defendant 5. It is enough to state that on 13th February 1934, the Subordinate Judge dismissed the suit, holding that Lalta Bibi had the necessary authority of her husband to make the "will" of 1903. On 19th April 1938, the appeal filed by Brij Mohan against the decree was dismissed by the High Court. On 12th October 1932, Lal Kishan Lal already mentioned and others brought Suit No. 14 of 1932 under S. 92, Civil P. C., for the removal of respondent 1 and Gopi Nath from the office

of trustees. Gopi Nath died during the pendency of the suit. On 23rd August, the District Judge decreed the suit and ordered respondent 1 to be removed from the office of trustee. It was in the course of this suit that Mr. R. N. Basu was appointed receiver of the properties by order of the Court dated 9th December 1932. As stated already, when respondents 1 to 3 failed to contest the present suit, the idol, respondent 4, was made a party to it through the receiver. The trial Court framed nine issues of which the following are material for the purposes of this appeal :

"1. Whether the property mortgaged belonged to defendants 1-3 or to defendant 4, on the date of the mortgage in suit ?

2. Whether Janki Prasad, Brij Mohan Das and Mannu Lal executed the mortgage in suit ? Is the mortgage in suit binding on defendant 4 ?

4. Whether the property in suit is liable to sale under the mortgage in suit ?

6. Whether the mortgage bond in suit was executed by a person competent to mortgage the property of defendant 4 ?

9. Whether the mortgage in suit was executed in the interest of defendant 4 ? If so, how does it affect the suit ?"

On the above issues and other relevant matters the Subordinate Judge found that the property in suit belonged to the idol and not to respondents 1-3; that the deed was executed by respondents 1-3; that the decree in Suit No. 141 of 1919 was a valid charge on the trust property; that the idol was benefited from the consideration of the mortgage to the extent of Rs. 13,547-6-6, the amount payable under the decree; that respondent 1 alone was the de facto manager and trustee and was entitled to act in an emergency and save the property from destruction and preserve it for the benefit of the idol; and that respondents 2 and 3 had no title to the property and that "their joining in the suit would not affect in any way." He further held that cl. 5 of the mortgage-deed which he described as an "all estate clause" conveyed not only the title of respondent 1 expressly mentioned in the bond but his title to the property as a trustee and manager of the idol. He stated :

"I agree with the contentions of the plaintiff's learned counsel that in the case of transfer all the rights and title of the transferee whether patent or latent is transferred."

In the result, the appellant was given a decree for Rs. 13,547-6-6 together with interest amounting to Rs. 18,873-5-9 with proportionate costs against defendant 4. Shortly stated, it is clear from what has been said above that the Subordinate Judge came to the conclusion that though the property mortgaged under the deed belonged to the idol and not to the mortgagors it could be proceeded against under the suit mortgage because (1) the appellant by discharging the mortgage debt by

his loan had subrogated himself to the rights of the decree-holder in Suit No. 141 of 1919 in which he had obtained a decree for the sale of the suit property; and (2) under clause (5) read presumably with his finding that respondent 1 was the de facto manager, the rights of the idol in the property had been validly mortgaged by him by mortgaging all rights and interest which he held, which would include the title to the property vested in him as trustee of the idol also. In support of ground No. 1, the learned Subordinate Judge relied on the equitable doctrine of subrogation enunciated in the well-known decision in (1910) 2 Ch. 277.¹ In passing, he also referred to ss. 91 and 92, T. P. Act. On appeal the learned Judges of the High Court held that the appellant is not entitled to the rights of subrogation under s. 92, T. P. Act, which they held applied to the case, as the money was advanced to respondent 1 and his relatives, and not as required by the section, to the "mortgagor," the idol, "whom respondent 1 was not representing." They also added that having regard to the circumstances of the case the trial Court was

"incorrect in finding that at the time of the mortgage-deed in 1926 Janki Prasad was de facto manager and mutwalli"

of the idol and that he could not by himself represent its interests, and that the deed was not binding on the idol as it was not executed by all the trustees. They agreed with the Subordinate Judge on his other findings. In the result, the decree of the trial Court in favour of the appellant was set aside. In this appeal, Sir Thomas Strangman argued that "in the circumstances of the case the appellant was entitled to be subrogated to the rights of the decree-holder in suit No. 141 of 1919"

and further, he supported the judgment of the Subordinate Judge for the reasons therein given. As the question for decision is whether the mortgage deed is binding on the idol, their Lordships will first examine the terms of the deed to which they have already drawn attention. After reciting the death of Lalta Bibi in 1908, the document states that since her death Mukandi Lal, father of the executants, had been in possession of the suit property by right of inheritance and since his death the executants had been in "proprietary possession" thereof. Then it states that it is necessary to pay the mortgage debt on the property which had been created by Lalta Bibi for valid reasons as found by the High Court in A. S. No. 41 of 1921, that the property is sought to be sold in auction and that it is necessary to pay the debt to safeguard the property "which is likely to prove beneficial to the family and to the minor." Then it says in cls. 5 and 8

1. (1910) 2 Ch. 277, *Butler v. Rice*.

that all the rights and interests appertaining to the house held by the executants "at present, or we (the executants) might acquire in future" are pledged for the loan and that "the creditor shall have all powers and rights of sale by auction which the decree-holder in Appeal No. 41 of 1921 has in satisfaction of which the property has been advertised for sale."

It is clear to their Lordships that respondent 1 purported to execute the deed along with his brother and his son, claiming the property as their own family property. In the whole of the document from beginning to end there is no mention whatever that the idol has any rights in the property. It is no doubt true that the necessity for the loan was said to be the impending sale of the property and the execution of the decree against the idol, but the property is to be safeguarded as it is likely to prove beneficial to the family and the minor, and not to the idol. In their Lordships' opinion the document by its terms does not purport to mortgage the interests which the idol has in the property. This is the opinion of the High Court as well as of the trial Court also; if so, it is difficult to see how under the express terms of the document any interest which the idol has in the property can be proceeded against.

The Subordinate Judge, however, thinks its interests in the property have been mortgaged because of cl. 5 of the deed, read in the light of his finding that at the time of the deed respondent 1 "alone" was the de facto manager and trustee of the idol and was entitled to act in emergency. Shortly put, the reasoning is that cl. 5 of the deed by mortgaging all his rights in the property has mortgaged his rights as a trustee of the idol also and as he "alone" was, as the result of his finding, the de facto trustee, the entire interest of the idol has been validly mortgaged under the document. Assuming that the Subordinate Judge's interpretation of clause 5 is right, to support his finding it is still necessary to show that at the time respondent 1 "alone" was the de facto manager and trustee of the idol entitled to act in emergency. On this point the learned Judges of the High Court have come to the conclusion that in the circumstances of the case

"Janki Prasad neither purported to represent Sri Thakurji (the idol) nor would he have been a proper person to represent Sri Thakurji in any transaction." Their Lordships are in accord with this opinion. As they read the "will" of Lalta Bibi, though some powers are given to the trustees to act singly in para. 12, the document, as pointed out by the High Court, does not give to a single mutwalli any power to execute a deed of transfer—nor is such a power given to him by law. In the suit by the Secretary

of State for India (suit No. 95 of 1913) respondent 1 set up the title of the idol to the suit property. His view seems to have undergone a change as a result of that suit. In subsequent litigations, first somewhat vaguely and then definitely he pressed his family's claim to the property though in fact during all that time he continued to be one of the trustees of the idol. He might have had some justification for doing so as a result of the decision in the rent suits, and of the order for the mutation of names in the municipal registers with respect to the property made on 1st July 1926 in favour of himself and his brother Brij Mohan. On 30th March 1926, however, these two brought the Suit No. 54 of 1926 to set aside the decree in Suit No. 141 of 1919 in which it is said that on the death of Lalta Bibi, Mukandi Lal became the owner of the property and was in possession through his life-time, and the plaintiffs are described as heirs of Mukandi Lal. The suit was dismissed as an attempted compromise fell through and the suit property was brought to sale by the decree-holder in execution of his decree. It was then, and not till then, that the mortgage deed was executed and the money borrowed by the executants to save the property from sale; and consistently with the claim which they had been urging they stated in the deed that the property belonged to them. These facts stated here in bare outline, and the evidence in the case, all of which have been examined by the learned Judges, support their conclusion that at the time of the mortgage respondent 1 was not competent by himself alone to represent the idol nor did he as a matter of fact purport to represent it. It is true that the final decree in the mortgage Suit No. 141 of 1919, was granted against the idol "through" respondent 1 alone and that the decree and sale proclamation also mentioned his name only, but the suit was brought against all the three trustees and the mere statements in the decree and proclamation do not amount to any valid declaration that respondent 1 was the sole trustee entitled to act on behalf of the idol. In this connexion attention may be drawn to the fact that though in September 1927, Gopi Nath made an application in Suit No. 85 of 1927 that he be exempted from the case, yet the High Court held that the property belonged to the idol and that respondent 1 and Gopi Nath had validly been appointed trustees under the "will."

The position in 1926 with regard to the trustees was this:—Lalta Bibi had under her "will" of 1907 appointed three trustees, respondent 1, Gopi Nath and Jugal Kishore to manage the affairs of the idol. Of these, Jugal Kishore had died during the pendency of Suit

No. 141 of 1919, and Gopi Nath had "apparently ceased to act" — as mentioned by the High Court—though he remained a trustee. Thus, only respondent 1 continued to interest himself in the suit property in 1926. So far, their Lordships have been testing with reference to the evidence the correctness of the High Court's finding that he did not represent the trustees in the suit transaction and was acting only for himself. This finding if correct would show that he cannot by his execution of the document convey the property of the idol to the appellant. Even if their Lordships accept the finding of the Subordinate Judge that respondent 1 was the *de facto* manager and trustee entitled as such to act in emergency, still in law, the execution by him alone of the deed would be ineffective in conveying a valid claim to the suit property. In this connexion attention may be drawn to the following statement of the law from Lewin on Trusts, Edn. 14, page 196 :

"In the case of co-trustees the office is a joint one. Where the administration of the trust is vested in co-trustees, they all form as it were but one collective trustee, and therefore must execute the duties of the office in their joint capacity. It is not uncommon to hear one of several trustees spoken of as the acting trustee, but the Court knows no such distinction; all who accept the office are in the eyes of the law acting trustees. If any one refuse or be incapable to join, it is not competent for the others to proceed without him, but the administration of the trust must in that case devolve upon the Court. However, the act of one trustee done with the sanction and approval of a co-trustee may be regarded as the act of both. But such sanction or approval must be strictly proved."

Their Lordships consider this to be a correct statement of the law applicable in England and that the same doctrine applies in India also : *see* 19 C. W. N. 260.² For these reasons, the mortgage deed is not binding on the trust estate. Their Lordships will now proceed to consider whether the appellant is entitled to be subrogated to the rights of the decree-holder in Suit No. 141 of 1919, on the broad ground that the debt binding on the suit property having been paid off with his money, it became liable for the said amount. The doctrine of subrogation is in essence a simple matter. It means the substitution of one creditor for another. The law of subrogation in India is contained in S. 92, T. P. Act. This section is new and was inserted by S. 47 of Act 20 of 1929. By S. 39 of the amending Act, ss. 74 and 75, T. P. Act, which contained only in an imperfect form the law of subrogation were repealed. The new section deals with the rights of subrogation of two different classes of persons. Paragraph 1, which deals with the rights of

2. (15) 2 A.I.R. 1915 Cal. 33 : 24 I. C. 266 : 19 C.W.N. 260, Abdul Gafur v. Umakanta.

persons who have an existing interest in the property, states that :

"Any of the persons referred to in S. 91 (other than the mortgagor) and any co-mortgagor shall on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee."

Paragraph 3 with reference to which the case of the appellant was argued deals with the rights of strangers who acquire an interest in the property. It runs as follows :

"A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated."

The right mentioned above referred to usually as "conventional or contractual" subrogation is founded upon the principle of an agreement between a borrower and a lender, that the lender shall be subrogated to the rights of the original creditor. As S. 92 was not in force at the time of the suit mortgage, viz., December 1926, the question was raised whether or not it has retrospective operation. On this point the opinions of the High Courts in India are divided. The case was also argued with reference to the law as it stood prior to the amendment. Their Lordships, however, do not think it is necessary to decide the question whether the section has or has not retrospective effect as in their opinion the appellant is not entitled to the right of subrogation whether the case is governed by S. 92 or by the previous law.

Under the statute, the question to be decided is whether on the findings arrived at by the High Court, which their Lordships endorse, the appellant's case for subrogation would fall within the language of para. 3 of S. 92. The facts have established that the appellant has loaned money to respondent 1, and with the money so obtained the decree debt in A. S. No. 41 of 1919 was discharged by him and in consequence the idol was benefited, the trust estate having been freed from the burden imposed on it by the decree. But the appellant in order to succeed must prove that the money was advanced by him to the mortgagor. In the present case, that has not been proved as the money was advanced, not to the idol through its trustees, but to respondent 1 personally who could not by himself represent the idol; nor is any registered instrument executed by both trustees forthcoming; the only document is that signed by respondent 1 alone. For the same reason, the agreement in cl. 8 of the deed also does not advance the case of the appellant as, at best, it is only an agreement by a single trustee. The defect which

has proved fatal to the appellant's claim under the document has proved equally fatal to his claim based on the statute also.

Turning now to the law as it was in 1926, Sir Thomas Strangman rested his case upon the equitable doctrine of subrogation enunciated in (1910) 2 Ch. 277.¹ In that case, a husband obtained money on the property of his wife to pay off a mortgage debt binding on her property without her knowledge and authority, and relief was given to the creditor, a mere stranger, who had no interest in the property, on the principle of subrogation. This decision would seem to support the view that a mere volunteer who discharges a mortgage debt binding on the property, as in the present case, could claim to be subrogated to the rights of the creditor on the mortgaged property for the amount paid by him. Whatever force such a doctrine may possess in England, the Board has negatived such a plea as regards India : *see* 2 I. A. 131.³ Even before the amendment of the Act, to support a claim to subrogation by one who has lent money to a mortgagor to redeem a mortgage, an agreement express or implied that the lender shall be subrogated to the rights of the creditor was necessary to be proved. In this connexion reference may be made to the Board's decision in 67 I. A. 82⁴ at p. 88 where in considering what was the law as to "partial subrogation" before the Act was amended by Act 20 of 1929, Lord Romer who delivered the judgment of the Board observed as follows:

"Taking the law as it stood in December 1927, it has been nowhere better expressed than it was by Mookerjee J. in 36 Cal. 193.⁵ That learned Judge said this : 'It may be said in general that to entitle one to invoke the equitable right of subrogation he must either occupy the position of a surety of the debt, or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security or must stand in such a relation to the mortgaged premises that his interest cannot otherwise be protected.'"

The rest of the observations are not relevant as they deal with the immediate question which the Board was then considering. It is clear from the above statement of the previous state of the law that the appellant being a mere stranger — neither being a surety of the debt, nor being otherwise interested in the property — has in order to succeed on the equitable doctrine of subrogation to prove that there was an agreement between him and the debtor or creditor that he should receive

3. ('74) 2 I. A. 131 : 3 Sar. 477 (P. C.), *Ramtuhul Singh v. Biseswar Lalsahoo*.

4. ('40) 27 A. I. R. 1940 P.C. 38 : I. L. R. (1941) 1 Cal. 291 : I. L. R. (1940) Kar. P. C. 82 : 67 I. A. 82 : 186 I. C. 1 (P.C.), *Janaki Nath Roy v. Pramanath Malia*.

5. ('09) 36 Cal. 193 : 1 I. C. 913, *Gurdeo Singh v. Chandrika Singh*.

and held an assignment of the debt as security. As he has not been able to prove such an agreement his appeal fails even under the previous state of the law.

After the amendment of the Act the right of subrogation can be claimed by the lender only if the mortgagor has by a registered instrument agreed that he shall be so subrogated. The right can no longer be claimed or granted as before, on very slight evidence or what may be described as the semblance of an agreement. In the present case, in their Lordships' view, there is no such evidence or semblance of an agreement between the appellant and the idol, or the creditor. The mere fact that money borrowed from him was used for paying off a previous charge does not entitle the appellant to the benefit of the discharged security. Lastly, it was argued forcibly, that if the appellant fails in the present suit the idol gets the property freed from liability with the aid of the appellant's money; and that therefore relief should be given to him on general principles of justice and equity; but as observed by their Lordships in 2 I. A. 131³ at page 143 :

" It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debts."

After giving full weight to every argument urged by the learned counsel on behalf of the appellant, their Lordships are unable to hold that the decision of the learned Judges of the High Court is wrong. They will humbly advise His Majesty that this appeal should be dismissed with the costs of the contesting respondent.

G.N.

Appeal dismissed.

Solicitors for Appellant—*Douglas Grant & Dold.*

Solicitors for Respondents — *Hy. S. L. Polak & Co.*

* A. I. R. (32) 1945 Privy Council 30

(From Allahabad)

17th October 1944

LORD PORTER, LORD GODDARD AND
SIR MADHAVAN NAIR

*Bishun Singh alias Babu Singh and
another — Appellants*

v.

*Sri Thakurji Mangla Nain Bhagwan
and others — Respondents.*

Privy Council Appeal No. 39 of 1939, Allahabad Appeals Nos. 4, 5 and 6 of 1936.

(a) Privy Council — Practice — Document in vernacular—Privy Council will adopt translation accepted by High Court.

In the case of documents written in the vernacular language it is the usual practice of the Privy Council to adopt the English translation of the same which has been accepted as correct by the High Court.

[P 32 C 1]

* (b) Hindu law — Widow — Husband can by will confer absolute power of transfer on his widow without making any bequest of property in her favour — Deed held operated as will and conferred on widow full power of transfer though not absolute estate.

Under the Hindu law it is competent to a husband to confer by will on his next heir the widow, an absolute power of transfer without making any bequest of property in her favour and in such case the widow, who would otherwise have had only limited power to transfer the property inherited by her from her husband, would have full authority to transfer the property in any manner she likes and the reversioners would have no right to question the transfers, even after the widow's death : 21 Bom. 709 (P. C.) and ('28) 15 A.I.R. 1928 P.C. 156, *Disting.*; 1 C.L.J. 301, *Considered.*

[P 34 C 2]

The widow in such case would acquire an estate almost like an absolute interest differing only in this respect that in the case of an absolute estate it would devolve on her heirs and whereas, in the case of a widow's estate with full powers of transfer, the property remaining untransferred would devolve on the next heir of the husband, though where daughter or daughters' sons would be the next heirs they would be heirs of both.

[P 34 C 1]

A deed of gift executed by a Hindu consisted of two parts. Under the first part certain properties were gifted to certain persons. The relevant portions of the second part of the document ran as follows : "The transferees, aforesaid, shall have, as proprietors all powers, like myself to make all kinds of transfers and I have transferred the property, made gift of, with all sorts of interest relating thereto, just like myself in favour of the transferees without the exception of anything and any interest. As regards other property with four anna zemindari share in mauza Deomai, which is in my possession and which under this document has not been transferred I shall have power of transfer and after my death my wife shall have power of transfer in respect of the remaining property of all kinds. For the present I do not make any arrangement or transfer regarding that property. If I the executant or my wife die without making (any) arrangement or transfer, then my property shall according to shastra devolve on my daughters who are alive or on their descendants, entitled to it." The substantial question for decision was as to what powers were conferred by the deed on the widow of the executant :

Held that (1) the deed in so far as it related to the widow could be looked upon as a "will" because the provisions in the document gave a clear indication of the testamentary intentions of the husband though there were no words of bequest in that portion of the document.

[P 33 C 1]

(2) The husband had not gifted any property to his widow under the document for he said explicitly "for the present I do not make any arrangement or transfer regarding the property."

[P 32 C 2]

(3) The deed did not confer on the widow any absolute estate in her husband's property but she acquired thereunder a full power of transfer in excess of the ordinary powers of transfer for legal necessity possessed by her as a Hindu widow and in the exercise of that full power she had authority to make any transfer to any person which would remain binding on the reversioners even after her death.

[P 35 C 1]

(c) Hindu law—Alienation—Widow — Powers of.

Under the Hindu law, a widow or other limited heir has no power to alienate the estate inherited by her from the deceased owner except for the following purposes, namely, (1) Religious or charitable purposes, (2) other purposes amounting to legal necessity, and (3) for the benefit of the estate. [P 34 C 1]

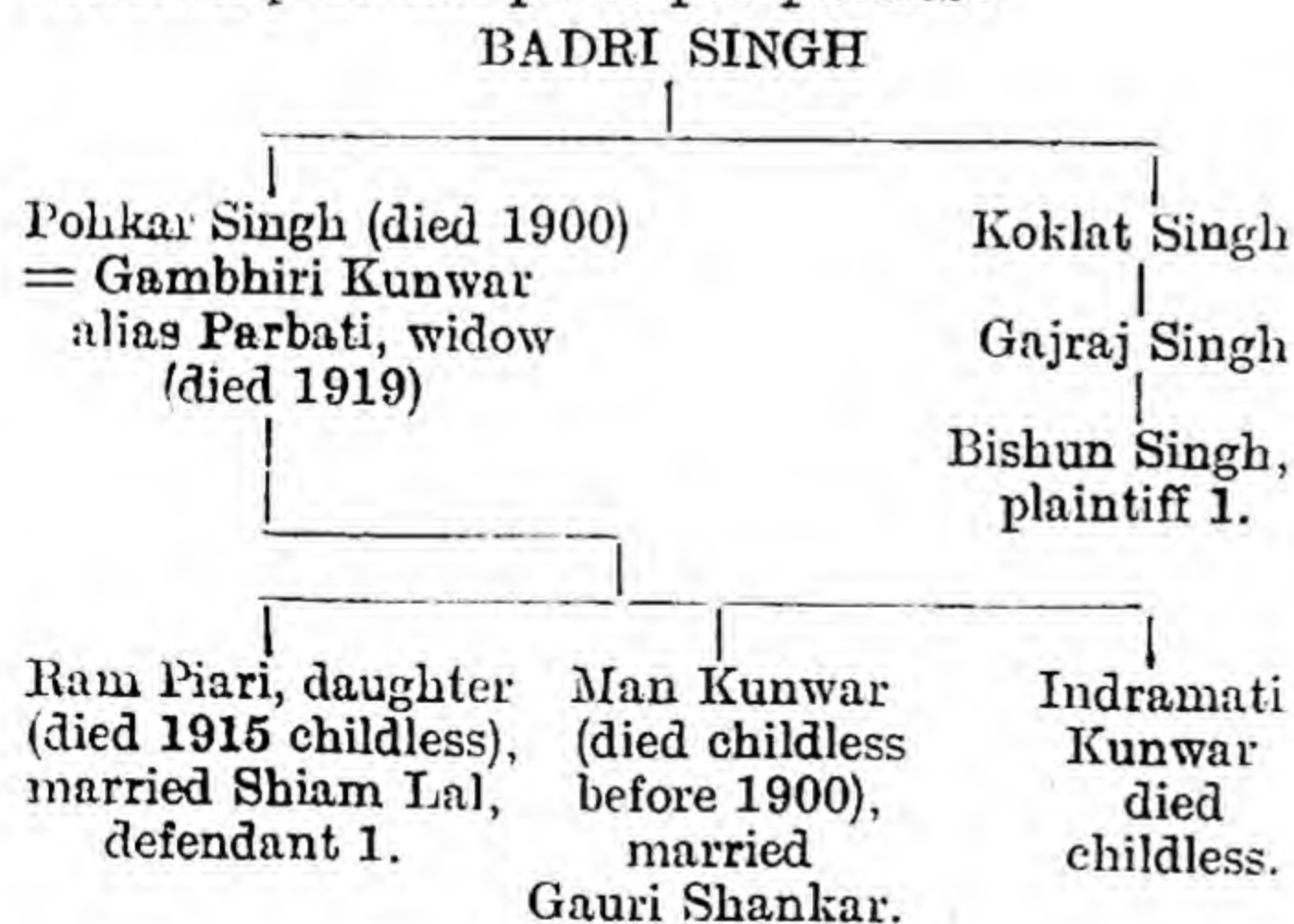
(d) Hindu law — Will — Construction — Will whether confers absolute estate on Hindu widow — Test.

In considering whether a will executed by a Hindu confers an absolute estate on his widow the principle to be borne in mind is that there is no magic in the use of any particular word or form of words; the document must be construed as a whole, and its fair import deduced in the ordinary way, and if the conclusion come to is that it confers the estate out and out with no reservation, the rights of alienation will be included just as much as any of the other incidents of ownership: ('30) 17 A. I. R. 1930 P.C. 253, *Rel. on*; 2 I. A. 7 (P.C.), *Ref.* [P 34 C 1]

S. P. Khambatta — for Appellants.

Sir Thomas Strangman and A. G. P. Pullan
— for Respondents.

Sir Madhavan Nair.—These are consolidated appeals from a judgment and three decrees of the High Court of Judicature at Allahabad dated 30th October 1935 which set aside a decree of the Subordinate Judge of Cawnpore dated 2nd January 1932 and dismissed the plaintiffs' suit as against all the present respondents. The appellants are the plaintiffs. Appellant 1 claimed the properties in suit as the nearest reversioner of one Pohkar Singh deceased; and appellant 2, is a transferee of half of the properties from appellant 1. Stated generally, the respondents all derived their title directly or indirectly from the transfers of the property made by Mt. Gambhiri, the wife of Pohkar Singh, who survived him and died in 1919. The following pedigree set out in the plaint explains the relationship of the principal parties:



The last male holder of the properties in question was Pohkar Singh, who died in 1900. He was separate from his brother Koklat Singh. He had three daughters, one of whom, Man Kunwar, had died before 1st October 1895 leaving a widower Gauri Shankar. Of the other daughters, Ram Piari, who died in

1915, was married to Shiam Lal (defendant 1), and Indramati was a minor unmarried. On 1st October 1895 Pohkar Singh executed a document purporting to be "a deed of gift" in favour of Gauri Shankar and others. The question for decision before the board is, what rights were conferred by this document on his widow by Pohkar Singh. After the death of her husband, Mt. Gambhiri executed the three following documents: (1) On 22nd May 1903 a deed of gift of certain properties in favour of her daughter Mt. Ram Piari. The latter died childless in 1915, and she made a deed of gift in favour of her husband Shiam Lal. (2) On 28th July 1914 a sale deed of a village and a shop in favour of the father of defendant 2. (3) On 26th September 1917 a deed of gift in favour of Shiam Lal. There have been subsequent transfers by the transferees from Mt. Gambhiri Kunwar.

The suit out of which this appeal arises was instituted by the appellants to set aside the alienations of the suit properties made by Mt. Gambhiri and her transferees, on the ground that Mt. Gambhiri had no power to make the said alienations as she took only the limited estate of a Hindu widow in the properties left by her husband, and that the alienations were not made for legal necessity. The respondents pleaded that the deed of gift above referred to, amounted also to a "will" in favour of Mt. Gambhiri by virtue of which she became the absolute owner of the properties in question and she had, therefore, every right to alienate them, the appellants' contention on these points being that the "deed" does not amount to a "will" as there are no words of bequest in it and that it should be ignored altogether, as it confers on Mt. Gambhiri nothing more than a widow's estate on the properties which as the widow of Pohkar she would ordinarily have. The deed of gift continuous in its narration of facts, consists in substance of two parts. By its first part, Pohkar Singh gifted a 16-annas share in Mauza Malkanpur and a 12-annas share in Mauza Deomai to Gauri Shankar, Ram Piari and Indramati in equal shares reserving to himself the remaining 4-annas share in Mauza Deomai. The relevant portions of the second part of the document run as follows:

"The transferees, aforesaid, shall have, as proprietors, all powers, like myself to make all kinds of transfers and I have transferred the property, made gift of, with all sorts of interest relating thereto, just like myself, in favour of the transferees without the exception of anything and any interest and after the registration of this document I shall get the mutation of names effected, as required, in favour of the transferees."

"as regards other property with 4-anna zamindari share in mauza Deomai, which is in my possession and which under this document has not been transferred, I shall have power of transfer and after my death my wife Mt. Gambhiri Kunwar shall have power of transfer in respect of the remaining property of all kinds" [or as Shyam Lal contends "shall have power of making every kind of transfer of the remaining property."]

"For the present I do not make any arrangement or transfer regarding that property. If I the executant or my wife die without making (any) arrangement or transfer, then my property shall according to shastra devolve on my daughters who are alive or on their descendants, entitled to it. Therefore I and my heirs and representatives shall have no objection to it, and if they do so, it shall not be heard, and will be null and void. Hence I have executed these few presents by way of a deed of gift so that it may remain as evidence and be of use when needed."

It may be mentioned in passing, that the document is written in the vernacular language of the parties; and there was dispute with regard to the translation of that part of it corresponding in the original to what has been enclosed within brackets in para. 2 of the extract given above. The board following the usual practice have adopted the translation accepted as correct by the High Court. Nothing arises in this appeal regarding the construction or subject-matter of the first part of the document. It is admittedly, what it purports to be, viz., a deed of gift. The dispute between the parties relates to the construction of its latter portion and the nature of this dispute has been already referred to. The contentions of the parties with respect to it were raised in the material portion of issue 2, and issue 3, which are as follows:

Issue 2.—"Whether Pohkar Singh made any 'will' by means of the deed of gift of 1895 or he died intestate?"

Issue 3.—"Was Mt. Gambhiri the absolute owner of the properties by virtue of the 'will' of Pohkar Singh as alleged by the defendants?"

The Subordinate Judge held that the "deed" constituted also a "will" in favour of Mt. Gambhiri, but according to him, there was nothing in its provisions

"to show that Pohkar Singh intended to confer an absolute estate, or anything more than a limited estate on his wife, or that he wanted to alter the course of inheritance in any way."

He accordingly held that the alienations complained against were invalid as they were not supported by legal necessity. The appellants were therefore given a decree for possession of the properties with profits, except 2 items about which there is now no dispute. On appeal, the learned Judges of the High Court held agreeing with the Subordinate Judge that no absolute estate was conferred on Mt. Gambhiri by her husband. They were also of opinion that the document was not intended by Pohkar Singh to effect any testamentary disposition of the property, but they held that even if Mt. Gambhiri took the property on

the death of Pohkar Singh as a Hindu widow still, the document conferred upon her as full a power of transfer over the properties as he himself had and the alienations in question which were made by her acting on this power were therefore valid. The appeals were therefore allowed and the plaintiffs' suit was dismissed. In this appeal, the substantial question for decision is what were the powers conferred on Mt. Gambhiri under the document? Did she get under it rights higher than those which a Hindu widow would ordinarily get over her husband's properties? The learned counsel Sir Thomas Strangman, on behalf of the respondents, does not contend that the document bestows on her an absolute estate in her husband's properties, nor does he contend that it makes any testamentary disposition of the properties. So the question which their Lordships have to consider reduces itself to this, viz., Is the interpretation put upon it by the High Court correct, or should the correct interpretation be, as strenuously contended for by Mr. Khambatta for the appellants, that the document confers on Mt. Gambhiri nothing more than an ordinary Hindu widow's limited estate? If the High Court's interpretation is accepted as correct, then, the further question—also considered by the High Court—arises, viz., Is the arrangement made by Pohkar Singh invalid under the principles of Hindu law?

It is clear to their Lordships that the "deed" does not confer on Mt. Gambhiri any absolute estate in her husband's properties. This is easily inferable from the contrast in the language used by Pohkar Singh in connexion with the gift of the property which he has made by the first part of it in favour of Gauri Shankar and others and the language used in describing what has been bestowed on Mt. Gambhiri. It is enough to say that the word "malik" does not appear in the latter portion of the document. It is equally clear that Pohkar Singh has not gifted any property to his wife under the document; for he says, explicitly "For the present I do not make any arrangement or transfer regarding the property." The learned Judges have pointed out that the word in the vernacular translated in English as "arrangement" means a testamentary disposition of the property, and the word "transfer" would indicate transfer inter vivos, such as transfer by gift. Their Lordships apprehend that it is not the case of any party to the suit that any subsequent gift of the properties had been made by Pohkar Singh in favour of his wife. Paragraph 31 of the written statement of Shiam Lal, one of the respondents before the Board, makes this clear. It therefore follows—if there was nothing else in the document—that Mt. Gambhiri would take only the limited estate

of a Hindu widow in the properties of her husband. This would apply to all the properties of Pohkar Singh as the words "the other remaining property together with 4 annas zamindari share" are certainly wide enough to include the rest of his entire estate, though only the properties gifted to his daughters were specified in the brown paper attached to the main sheet. In their Lordships' view, that part of the document may well be looked upon as a "will" as has been accepted by the Subordinate Judge and treated as such by the learned Judges of the High Court. The point is not of much importance in the case, but their Lordships are referring to it because it was argued in the Courts in India that there are no words of bequest in that portion of the document and the learned counsel for the appellants made an allusion to it in opening the case, suggesting thereby that that part of the document may well be ignored altogether. Their Lordships think that the provisions in the document give a clear indication of the testamentary intentions of Pohkar Singh and that is all that at this stage need be said on the point.

So far, the construction of the document has not been difficult; but does it by any means follow from what has been said above, as has been emphasised by Mr. Khambatta that Mt. Gambhiri gets under the document only a Hindu widow's limited estate and nothing more? Their Lordships think not, for to hold so would be to ignore a significant part of it to which their Lordships will now draw attention. With respect to the properties remaining after making the gift, Pohkar Singh says :

"As regards the other property with 4 annas zamindari share in mauza Deomai which is in my possession and which under the document has not been transferred, I shall have power of transfer and after my death my wife Mt. Gambhiri Kunwar shall have power of transfer in respect of the remaining property of all kinds."

It is clear to their Lordships that by this portion of the document Pohkar Singh was conferring a "power of transfer" in respect of his remaining estate on his widow. Note the words he uses: he says "I shall have power of transfer and after my death my wife Mt. Gambhiri shall have power of transfer." It is evident that by these words he refers to the free power of transfer which an owner has over his properties and he uses the same words in the same sense both with reference to himself and to his wife. In the earlier portion of the document referring to the gift, Pohkar Singh confers on the donees "all powers like myself to make all kinds of transfers." It is obvious that the word "transfer" must be understood as having been used in the same sense throughout the document, in

other words, it means that Pohkar Singh bestows on his wife as full a power of transfer as he, the owner himself, has over the properties. The contention that the power of transfer referred to, with respect to Gambhiri is merely the power of transfer which a Hindu widow has over her deceased husband's properties in cases of legal necessity cannot be accepted, for if that were so, there was no need to confer specifically any such power at all, for, indeed, as his widow, Gambhiri would always get a Hindu widow's estate with power to transfer the properties for legal necessity. What appears to their Lordships to clinch the matter is the provision in the document :

"If I the executant or my wife die without making (any) arrangement or transfer then my property shall devolve according to shastras on my daughters who are alive"

In their Lordships' view this provision contemplates two things, (1) What it clearly says, viz., that the property should devolve according to shastras "if he or his wife died without making any arrangement or transfer;" and (2) What it implies, viz., that the property would not devolve on daughters according to Hindu law if his widow had made any other arrangements during her life time. Arrangements with respect to the properties are here contemplated which certainly implies that Pohkar Singh had intended to confer powers on his wife to effect such arrangements. There is nothing in the document to show that the transfer herein contemplated is one for legal necessity only. As observed by the learned Judges of the High Court :

"Had he intended that the property should devolve on the daughters in spite of any transfers having been made by the widow which are invalid under the Hindu law, he would not have prefixed the devolution "according to shastra" by the condition of his wife dying without making any arrangement or transfer."

It is true that their Lordships have said in 2 I. A. 7¹ at pages 14-15 :

"In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu . . . knows that as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate," but that statement is no authority for the proposition that if the terms of the will give the woman an absolute right of disposition those terms should be ignored. In this connexion their Lordships may well draw attention to the following observations made by Sir George Lowndes in delivering the judgment in 57 I. A. 291² at page 294 :

1. ('74) 2 I. A. 7 : 3 Sar. 405 (P. C.), Mahomed Shamsool v. Shewukram.

2. ('30) 17 A.I.R. 1930 P.C. 253 : 57 I.A. 291 : 128 I. C. 270 (P.C.), Jagmohan Singh v. Sri Nath.

"There is, their Lordships think, no magic in the use of any particular word or form of words; the document must be construed as a whole, and its fair import deduced in the ordinary way, and if the conclusion come to is that it confers the estate out and out with no reservation, the rights of alienation will be included just as much as any of the other incidents of ownership, and just as much where the gift is to a female as where it is to a male."

Construed in this light their Lordships have no doubt that by the terms of the deed in question Pohkar Singh has conferred on his widow full power of transfer over the properties which she has inherited from him as his widow. Under the Hindu law, a widow or other limited heir has no power to alienate the estate inherited by her from the deceased owner except for the following purposes, namely: (1) Religious or charitable purposes (2) other purposes amounting to legal necessity and (3) for the benefit of the estate. The question now arises, whether if a Hindu owner confers an absolute power of transfer on his next heir, the widow, who would otherwise have had only a limited power of transfer, does she thereby get any higher rights? It is not free from difficulty. On the one hand, it may be said that when a testator dies without making any disposition of property his widow would ordinarily get only such estate as the Hindu law allows her, and where there is no devise of any estate as here in favour of the widow, the conferment of an absolute power gives her no more rights than those possessed by a Hindu widow. On the other hand, if the husband could validly confer on her a full power of transferring the estate without limitation then as stated by the High Court:

"She would acquire an estate almost like an absolute interest differing only in this respect that in the case of an absolute estate it would devolve on her heirs and whereas, in the case of a widow's estate with full powers of transfer, the property remaining untransferred would devolve on the next heir of the husband, though where daughter or daughter's sons would be the next heirs they would be heirs of both."

If the conferment of such power of transfer on a Hindu widow is not repugnant to any principles of Hindu law, then it appears to their Lordships, that such conferment should be upheld as by so doing they would only be giving effect to the intentions of the testator, such intentions being not in conflict with the law. It may be stated at once that no decision directly bearing on the point has been brought to their Lordships' notice; those that are said to throw some light on it will be referred to presently. On principle, the difficulty presented by the case does not seem to be insurmountable. The objection strongly urged is against the conferment of power of transfer on Gambhiri without any bequest of property

in her favour; but the testator knows that she would inherit the estate in the ordinary course. What she will not so get ordinarily has now been bestowed on her by this "deed." The power of transfer has not been conferred on one, while the property devolves on another. Pohkar Singh was the absolute owner of the estate and had full power to dispose of it in any manner he liked. While he had full power to bestow an absolute estate on his widow, their Lordships cannot find any valid objection to his being allowed to bestow a fuller power of transfer on her who would get the estate as his heir. This conclusion does not clash with any fundamental principle of the Hindu law.

In the course of the arguments, the learned counsel drew their Lordships' attention to the decisions in 24 I. A. 93,³ 55 I. A. 180⁴ and some other cases referred to in the High Court's judgment to show that conferment of power to adopt, of larger power to alienate, etc., on persons holding limited estate are not illegal, but as these cases are admittedly distinguishable on facts their Lordships do not think it is necessary to discuss them. However, one decision may be referred to as of some interest having regard to its facts. In 1 C. L. J. 301,⁵ a testator "by his will empowered his two wives to make a patni settlement of his immovable property" and wished that they would make the patni settlement with his brother. The two widows were given monthly allowances but no bequest of the estate was made in their favour. By one clause in the "will" full authority was given to three persons to do what they thought fit as regards the performance of the rites and the debts and the dues. It was held by the learned Judges of the High Court that the clauses of the "will" by which the executors were authorised to pay the expenses of the rites and ceremonies and the debts and the widows were empowered to make patni settlement of the immovable property were not inconsistent. The power of the widows to make patni settlement of the immovable property was recognised as it did not clash with the authority given to the executors. As pointed out by the learned Judges of the High Court in the present case:

"This was a case where in reality there was no bequest of any estate to the wives at all and they were given some allowances and only a power to make a patni settlement with the testator's brother. The power to make such a transfer was assumed to be valid by the Bench and it was not considered that the conferment of such a power on a Hindu woman

3. ('97) 21 Bom. 709 : 24 I. A. 93 : 7 Sar. 140 (P. C.), Bai Motti Vahoo v. Bai Mamobai.

4. ('28) 15 A. I. R. 1928 P.C. 156 : 50 All. 375 : 55 I. A. 180 : 109 I. C. 703 (P. C.), Narsingh Rao v. Mahalakshmi Bai.

5. ('05) 1 C. L. J. 301, Promode Bala Debi v. Krishna Sundari Debi.

was in any way repugnant to the principles of the Hindu law."

This case is referred to as an instance to show that the idea of conferring enlarged powers of alienation on widows without making bequest of any estate is not alien to the minds of Hindu testators. However, their Lordships' decision in the present case must rest on the principles on which they have based it and not on any express decision brought to their notice. For the above reasons, their Lordships hold, agreeing with the High Court, that :

"Although Mt. Gambhiri Kunwar did not acquire an absolute estate under the 'will' of her husband she acquired thereunder a full power of transfer in excess of the ordinary powers of transfer for legal necessity possessed by her as a Hindu widow, and in the exercise of that full power she had authority to make an out and out gift to her daughters which would remain binding on the reversioners even after her death."

The alienations questioned in these appeals are all valid. In the result, these consolidated appeals should be dismissed with the costs of the respective respondents. Their Lordships will humbly advise His Majesty accordingly.

G.N.

Appeals dismissed.

Solicitors for Appellants — *Harold Shephard.*

Solicitors for Respondents — *Douglas Grant & Dold.*

A. I. R. (32) 1945 Privy Council 35

(*From Madras*)

17th October 1944

LORD PORTER, LORD GODDARD AND
SIR MADHAVAN NAIR

Al. Vr. St. Virappa Chettiar—Appellant
v.

Periakaruppan Chettiar — Respondent.
Privy Council Appeal No. 15 of 1943.

(a) Privy Council—Appeal—Accounts—Taking of accounts between principal and agent involving no principle—Decision of High Court on items is conclusive unless shown erroneous beyond all question — Controversy relating to ordinary items of accounting is not proper subject-matter of appeal to Privy Council.

In the case of taking of accounts between a principal and agent, where no question of principle is involved the decision of the High Court on the various items should be treated as conclusive in the appeal before the Privy Council unless the appellant can prove that the decision is beyond all question erroneous : ('42) 29 A I.R. 1942 P. C. 61, *Rel. on.*

[P 36 C 2]

Where the controversy relates to ordinary items of accounting in the taking of accounts between a principal and agent it does not form a proper subject-matter for an appeal to His Majesty in Council : ('44) 31 A. I. R. 1944 P. C. 87, *Rel. on.* [P 38 C 1]

(b) Appeal—Evidence—Finding of fact drawn from oral and documentary testimony depending on weight of evidence and not on credibility induced by demeanour of witness or manner of his deposition—Trial Court is in no better position than appellate Court.

Where the findings as regards facts have been drawn from "argumentative inferences" from the testimony oral and documentary produced by a witness, and depend upon "the weight of evidence" and "the inherent probabilities of the story," and not on the credibility induced by his "whole demeanour in the witness box," or "the manner in which he answers questions," the trial Court is in no better position than the Court of appeal in discovering the truth and therefore there is no reason why the appellate Court should attach great weight to the judgment of the trial Court in such a case. [P 37 C 2]

Sir Herbert Cunliffe and P. V. Subba Row —

for Appellant.

J. M. Parikh and Ralph Parikh — for Respdt.

Sir Madhavan Nair. — This is a consolidated appeal from a decree of the High Court of Judicature at Madras dated 21st October 1940, which modified a decree of the Subordinate Judge of Coimbatore dated 26th March 1937. The appeal arises out of a suit brought by the appellant representing the joint Hindu family firm AL. VR. ST., which carried on business as money lenders, against its agent the respondent, for accounts. The dispute between the parties now relates to the liability of the respondent with reference to certain items of account decided against the appellant by the High Court. It may be mentioned that the respondent though an agent of the appellant's firm was authorised to carry on business for his personal benefit and to draw from the firm for that purpose, and the accounts disclose that he was carrying on business on behalf of some of his relations and "possibly of some relations of the plaintiffs also."

The business of the family carried on at Bhavani in the Coimbatore District of the Province of Madras, with which this litigation is concerned, was started in 1911 by the father of the appellant Virappa and his two brothers, Lakshman and Ramanathan. The father died in 1913. The first agent of the firm was one Sunderaraj. The period for which each agent was appointed lasted for about three years, more or less. Sunderaraj's agency referred to as the first period ended in September 1914, when the agency of the respondent commenced. He was appointed agent successively for 1914-1917, 1917 to August 1919, August 1919 to August 1922, referred to as the 2nd, the 3rd, and the 4th period of agency. His 5th period of agency commenced in August 1922.

In November 1924, the appellant who was appointed Receiver on 3rd December 1923, in a partition suit brought by their maternal grandfather on behalf of himself and his minor brother against their elder brother Lakshman on account of mismanagement, and had been in that capacity superintending the business at Bhavani, terminated the respondent's agency, and brought on 20th December 1924, the suit which has given rise to this appeal,

charging him with misappropriation, and falsifying accounts, and praying for a decree to direct him to render due and proper accounts, to deliver what are known as rokka chittai accounts, and to pay a sum of Rs. 68,955-15-6 with interest and for other relief. The rokka chittai accounts which were called for, were produced by the respondent in Court in January 1925. Before proceeding further, it will be advantageous to state the nature of these accounts as a large amount claimed in the suit is based on entries contained therein. These accounts do not give particulars of anything but contain only memoranda wherein credits and debits are entered without any detail. The following passage taken from the judgment of the High Court explains their nature and the other account books in this case :

"It may be observed here that these rokka chittai accounts were intended to relate mainly to dealings or transactions of a provisional character, and covered not merely the dealings of the plaintiff's firm, but also dealings which the defendant was authorised to carry on for his own personal benefit as well as dealings which he was carrying on on behalf of certain persons who can be conveniently referred to as the relations, for among them were certainly defendant's wife, sister and daughter and possibly—though this does not clearly appear—some relations of the plaintiffs. Regular accounts consisting of bound day-books and ledger-books were maintained in respect of the dealings of the plaintiff's firm and the defendant's own individual dealings and somewhat less formal accounts were also separately kept in the form of small stitched note-books in respect of the dealings of these relations, which were far fewer in number and smaller in extent. The rokka chittais which related in part to dealings under each of the above categories were small loose sheets of papers strung together and were thus of an informal character. It is common ground that these rokka chittais were mostly written by one or other of the three clerks who were employed in the plaintiff's firm and were working under the defendant."

By the judgment of the High Court in appeal, dated 17th November 1931, which modified the preliminary decree passed by the Subordinate Judge on 3rd December 1928, it was held that the respondent should render accounts during the 4th period of his agency commencing from February 1922, the date of the institution of the partition suit, and for the 5th period till its termination. As the respondent had not delivered rokka chittais till after the suit was filed the High Court also held, as mentioned in the judgment now under appeal, that the appellant and his brothers "were entitled to call upon the respondent to render an account of the transactions disclosed by the rokka chittais and not covered by the other accounts which the respondent had already delivered though such transactions might relate to the period prior to February 1922."

The Subordinate Judge appointed an "auditor" to audit the accounts, and he submitted a report with reference to the various memo-

randa filed by the appellant. Both parties filed objections to this report. The Subordinate Judge then referred these objections to another person, a "Commissioner," who after examining various witnesses submitted his report considering the liability of the respondent in the light of the evidence. The liability of the respondent now in dispute before the Board relates to what are called petti varavu (box-credit) and petti pathu (box-debit) in Memo. No. 2. Memos. Nos. 9, 10, 11, 12 and 15, and the memorandum relating to "certain transfer entries." These are various items in the taking of accounts between the principal and his agent with respect to the transactions carried on by the latter during his agency. It has been held by the Board that in case of taking accounts where no question of principle is involved the decision of the High Court on the various items should be treated as conclusive unless the appellant can prove that the decision is beyond all question erroneous. (See the practice note in the case of *Lala Hakim Rai*, (1942), 69 I. A. 172.¹ Their Lordships will now examine the case of the appellant with reference to the various memoranda in the light of the principle laid down in this judgment.

Memorandum No. 2 petti varavu (box-credit) and petti pathu (box-debit) are various entries of credit and debit which the auditor has collected from the rokka chittai accounts. On the whole, these entries balance each other and nothing is found due to the appellant's firm. The appellant's case as regards these items is that the "box" referred to, is the firm's cash chest, petti varavu representing moneys received on behalf of the firm, and later on, misappropriated by the respondent, the repayment entries with reference to them, noted as petti pathu being absolutely fictitious. The respondent's case is that the "box" represents a "small chest" in which the moneys of his relatives were kept, that these moneys were being borrowed when there were not funds enough in the firm for doing business and entered as petti varavu in the rokka chittai; and when they were repaid entries were made under the name petti pathu. The total amount claimed by the appellant under petti varavu is Rs. 10,390-11-6. Both the Commissioner and the Subordinate Judge have found that the case of the appellant is true, but that finding has been set aside by the High Court. It is true that the entries are admitted by the respondent, but having regard to the case set up by him, the amounts received as petti varavu are not moneys which belong to the appellant's firm. In view of the contentions of the parties,

1. Reported in (1942) 29 A. I. R. 1942 P. C. 61 : I. L. R. (1942) Kar. P. C. 157; 202 I. C. 754 (P.C.), *Lala Hakim Rai v. Lala Ganga Ram*.

the real question for consideration is whether the petti varavu entries represent the moneys paid into the firm as represented by the respondent, or are they moneys received by him on behalf of the firm? In this connexion it should be noticed that the charge against the respondent as originally put forward before the auditor was that "these transactions relate to private dealings of the respondent's wife and sister" and he noted that

"after hearing evidence the Court has to decide whether the transactions are temporary misappropriations. The defendant denies the plaintiff's allegations but has not offered any proper explanation."

It is obvious that the original claim related only to interest on sums unauthorisedly used by the respondent but subsequently returned by him. However, the present case was later on developed by the appellant through the evidence of P. W. 9. The respondent met it by relying on Ex. IX Series which he sought leave to produce in addition to the evidence which he had already tendered. These exhibits show as pointed out by the High Court that the respondent had a "sinna petti" (small box) in which the moneys belonging to his relations were kept and that now and again sums from this box were sent to the appellant's firm and credited in the chittai. This probabilises the case of the respondent. Even the evidence of P. W. 9, lends some support to the case of two boxes set up by the respondent. On this point, the question is one of evidence and the respondent's case has been accepted as true by the High Court. P. W. 9 says that one of the three sources which constitutes petti varavu is this, viz.,

"that debtors of the firm, when they pay into the firm towards loans, a portion alone is credited in the accounts with reference to the said inum and the balance alone is shown as petti varavu."

If this is true, then there is considerable force in the remark of the High Court

"How the original entries made in the regular accounts at the time of the advance of the loans, the correctness of which is not questioned could be squared with the alleged false entries showing smaller sums as received has not been explained and no single instance of such discrepancies in the regular accounts has been brought to our notice."

This throws considerable suspicion on the appellant's case with respect to petti varavu. Their Lordships have been taken through the entire evidence of the parties relating to this item in Memo. No. 2, and they have not been able to find that the learned Judges have disregarded any principle of law in arriving at their conclusion which appears to them to be borne out by the evidence. In this connexion, their Lordships must refer to the argument which Sir Herbert Cunliffe, the learned counsel, urged with great emphasis, namely, that the High Court in accepting the testimony of the defendant as the basis for its finding on this

point has not given due and sufficient regard to the well-known rule that on a question of credibility of a witness great weight ought to be given to the judgment of the Judge who saw and heard the witness. As regards this argument, their Lordships, besides saying that the High Court has arrived at its conclusion on a consideration of the merits of the evidence, need only observe that the argument as applied to this case is fallacious, as neither of the Courts which had to decide the case had the benefit of seeing and hearing the witness; and the "Commissioner" who had that advantage does not in his report base his conclusion on the demeanour of the witness in the witness box or the impression produced by him on his mind. They may also add, that in a case like the present, where the findings as regards facts have been drawn from "argumentative inferences" from the testimony oral and documentary produced by a witness, and depend upon "the weight of evidence" and "the inherent probabilities of the story," and not on the credibility induced by his "whole demeanour in the witness box," or "the manner in which he answers questions," their Lordships think — as they have often expressed in their previous decisions — that the trial Court is in no better position than the Court of appeal in discovering the truth. Turning now to the liability of the respondent raised in the other memos., the learned counsel for the appellant has frankly, and in their Lordships' opinion rightly, admitted that it is difficult to say that any question of principle is involved in the consideration of those items, though he tried strenuously to show that the findings called into question are all erroneous. It may be observed, that the Courts in India have recorded concurrent findings against the appellant on the matters raised in these memoranda. However, their Lordships will deal with these items very briefly, as they were discussed before them in the endeavour to find out whether any case in which the board will interfere can be made out in this appeal.

Memos. Nos. 9, 10 and 11 are very much of the same character. They relate to collections made by the respondent from his own debtors, neglecting to collect the amounts which they owed to the firm also. It is said with respect to them, that the respondent has shown a neglect of duty and attended to his own business sacrificing the due interests of his principal; but the learned counsel has not been able to show that the Courts have in any way misdirected themselves in law in dealing with the questions, nor was he able to show that the findings are erroneous. The same may be said about Memo. 12, which refers to the respondent's transactions with the clients of the

plaintiff's firm in spite of the prohibition with respect to such dealings: Memo. 15 relates to misappropriations alleged to have been made by the respondent of amounts paid by various persons, false debits being entered against them. Both Courts have rejected this charge for valid reasons. The next charge relates to what have been called "transfer entries." Balances appearing in certain accounts are said to have been wrongly transferred to certain other accounts. The respondent's explanation which appears to be satisfactory has been accepted by both Courts. Their Lordships' attention was next drawn to the order of the High Court with respect to samans (bonus), and the order which the learned Judge, passed as regards costs; on these matters also, their Lordships are not able to say that any principle of law has been disregarded by the High Court. On the whole, in their Lordships' judgment, the controversy raised with respect to the various items in this appeal, all relate to ordinary items of accounting in the taking of accounts between a principal and his agent, and do not in the language used by the board in the similar case, "form proper subject-matter for an appeal to His Majesty in Council." (71 I.A. 149.²) Their Lordships will, therefore, humbly advise His Majesty that this consolidated appeal should be dismissed with costs to the respondent.

G.N. *Appeal dismissed.*

Solicitors for Appellant — *Hy. S. L. Polak & Co.*
Solicitors for Respondent — *Lambert & White.*

2. ('44) 31 A.I.R. 1944 P. C. 87 : 71 I.A. 149 (P.C.),
N. R. Kapur v. Murli Dhar Kapur.

A. I. R. (32) 1945 Privy Council 38

(*From Supreme Court of Cyprus*)

6th March 1944

LORDS MACMILLAN, WRIGHT AND
CLAUSON

Vassiliades — Appellant

v.

Vassiliades and another — Respondents.
Privy Council Appeal No. 32 of 1942.

(a) Practice — Judge — He should be above suspicion of being biassed — Proceedings completed cannot be set aside except on proof of bias.

It is highly desirable that any proceeding should be dealt with by persons who are above any suspicion, however, unreasonable, of being biassed. But where the proceedings have been in fact held, they cannot be set aside except on legal proof of bias.

[P 40 C 2]

(b) Practice — Transfer — Justice should not merely be done but appear to be done—Patience of Judges should not however be tried—Procedure departed from on account of party's unreasonable conduct— Party cannot complain if no substantial injustice is done.

It is matter of public policy that justice should not merely be done but should appear to be done. Judges, however, are only human, and their patience is sometimes sorely tried by counsel and litigants. It is always to be regretted if their patience even appears to give way. But the administration of justice depends on the co-operation of the Judges and parties. Parties cannot complain whose improper or unreasonable conduct has led to a departure from the more regular course of procedure, so long as no substantial injustice is done. [P 40 C 2 ; P 41 C 1]

(c) Practice—Evidence—Cross-examination—Extent of — Discretion — Exercise of, fair and reasonable by the Judge—Appellate Court will ordinarily not question discretion.

No doubt cross-examination is one of the most important processes for the elucidation of the facts of a case and all reasonable latitude should be allowed, but the Judge has always a discretion as to how far it may go or how long it may continue. A fair and reasonable exercise of his discretion by the Judge will not generally be questioned by an appellate Court. [P 41 C 1]

(d) Practice—Appellate Court—Duty of.

The duty of an appellate Court sitting on appeal from a Judge is not the same as that of an appellate Court sitting on appeal from the verdict of a jury. In the former case the appeal is made by the rules a rehearing; the appellate Judges are Judges of fact. In the latter case the appellate Judges are not Judges of fact: (1935) A. C. 346 and (1935) A. C. 243, *Ref.* [P 41 C 2]

Richard O'Sullivan and S. N. Bernstein
— for Appellant.

Colin Pearson — for Respondents.

Lord Wright. — The two main issues in the appeal are: (1) whether the District Court and the Supreme Court were right in upholding the present respondents' claim that certain transfers and mortgages should be set aside (2) whether there were circumstances in the conduct of the trial before the District Court which entitle the appellant to object that the case had not been fairly tried. If the appellant were to succeed in whole or in part on the former issue, she would be entitled to judgment to that extent on the application. If she were to succeed on the latter issue, she would be entitled to an order for a new trial. The transfers and mortgages in question were granted to the appellant by her father Hadji Nicolas Vassiliades, who was adjudicated bankrupt on a petition filed by the appellant in September 1939. His trustee in bankruptcy was substituted for him in the proceedings, and is now respondent 2. Respondent 1, Artemis N. Vassiliades, a son of the bankrupt and a brother of the appellant, had obtained two judgments against his father, one dated 10th June 1937 for £200 with interest and costs on two bonds, in an action commenced on 7th November 1935, the other dated 25th June 1938 for £428 10s. with interest and costs in an action commenced by him on 12th November 1935. It is this latter action and judgment out of which these proceedings arise. The respondent having failed to obtain satisfaction for

his judgment, on 24th April 1939 took out a summons claiming that the transfers and mortgages set out in Schs. A, B, C and D all of which were executed in favour of the appellant, should be set aside "as effected with intent to hinder or delay" his father's creditors and in particular respondent 1. The appellant intervened in the summons as *ex parte* respondent. The respondent filed an affidavit setting out the grounds of his application, which was based on Law 7 of 1886 ss. 2 and 3, as amended by S. 2 of Law 10 of 1927. The sections in their amended form, are as follows:

"2. (1) Every gift, sale, pledge, mortgage or other transfer or disposal of any movable or immovable property made by any person with intent to hinder or delay his creditors or any of them in recovering from him, his or their debts shall be deemed to be fraudulent, and shall be invalid as against such creditor or creditors; and, notwithstanding any such gift, sale, pledge, mortgage or other transfer or disposal, the property purported to be transferred or otherwise dealt with may be seized and sold in satisfaction of any judgment debt due from the person making such gift, sale, pledge, mortgage or other transfer or disposal.

(2) In any application under the provisions of this law to set aside a transfer or assignment of any property made to any parent, spouse, child, brother, or sister of the transferor or assignor otherwise than in exchange for money or for other property of equivalent value or for good consideration the onus of proving that such transfer or assignment was bona fide and not made with intent to hinder or delay his creditors shall rest upon the transferor or assignor and upon the person to whom such transfer or assignment has been made.

(3) No sale, mortgage, transfer or assignment made in exchange for money or other property of equivalent value shall be voidable, under the provisions of the law, unless the purchaser, mortgagee, transferee, or assignee shall be shown to have accepted it with knowledge that such sale, mortgage, transfer, or assignment was made by the vendor, mortgagor, transferor, or assignor with intent to delay or defraud his creditors.

3. Any gift, sale, pledge, mortgage or other transfer or disposal of any movable or immovable property deemed to be fraudulent under the provisions of S. 2 of this Law whether made before or after the commencement of an action or other proceeding wherein the right to recover the debt has been established may be set aside by an order of the Court, to be obtained on the application of any judgment creditor made in such action or other proceeding, and to the Court before which such action or other proceeding has been heard or is pending."

The appellant opposed the application. But both before the District Court and the Supreme Court her opposition has been overruled and the transfers and mortgages have been set aside. In 1936 between 23rd May 1936 and 26th June 1936 while respondent 1's two actions were pending against Hadji N. Vassiliades hereinafter called Vassiliades, Vassiliades executed eight transfers, all but one of immovable property and all in favour of the appellant. On 25th June 1936 one Hortovadji commenced an action against

Vassiliades and another, and on the same day an interim order was made restraining Vassiliades from alienating his immovable property. Thereafter on 30th June 1936 Vassiliades made in favour of the appellant a bond for £86 payable on 1st August 1936 and on 23rd July 1936, purported by contract to sell to the appellant moveable properties for £792 and about the same period transferred to the appellant two mortgage bonds for £50 each. Thus in the period between 23rd May 1936 and 22nd June 1936, Vassiliades transferred to the appellant, partly before and partly after the commencement of Hortovadji's action and while respondent 1's two actions were pending, properties of a total value, even if the assessed values were taken, of over £2000. In addition to this extraordinary sequence of events, there was also evidence before the Courts which they accepted that the business of Vassiliades did not go well after 1920 and that his financial position at all times since 1920 had been serious and critical. There was other evidence to the same effect.

The law of Cyprus as stated in the sections cited above makes the intent of the transferor the crucial test for deciding whether the transfer or disposal is to be deemed to be "fraudulent." The fraud contemplated is not what has been called "moral" fraud; but consists in the intention of the transferor to "hinder" or "delay" (that is something less than "prevent") his creditors. Whether or not that intention exists, must be decided as an inference of fact from considering all the circumstances of the case. Here the embarrassed position of Vassiliades over a period of years, the actions against him and the judgments recovered and unsatisfied and in addition the most remarkable sequence of substantial conveyances within so short a period of time constitute very strong evidence. Vassiliades gave evidence but the Judge refused to credit anything he said. The appellant herself gave no evidence at all, in the witness box at the trial. Statements she made in an affidavit to show that the unsigned transactions were bona fide and for consideration were referred to, but rejected by the Courts. There was in their Lordships' judgment ample evidence for the conclusion of both Courts below that the transactions were not bona fide. It is true that under S. 2 (1) of the Act the onus is on the party seeking to set aside the transfers to prove his case, but the Courts below have considered the case on the footing that the onus so lay. Their Lordships also here proceed on the same view and arrive at the same conclusion as the Courts below. A question was raised as to the exact effect of the words "good consideration" in S. 2 (2) which deals with transfers as between

certain members of a family, otherwise than in exchange for money or other property of equivalent value or for good consideration. Good consideration in this statute, it was conceded, means something more than natural love and affection. It was said that even if it was accepted in respect of the two bonds included in Sch. D that there was no valuable consideration, there was "good" consideration because the transfer was by way of dowry, which it was said was good consideration like marriage consideration. The Courts below held this suggestion irrelevant because the appellant was neither married nor on the point of being married. There could thus be no question of applying in the appellant's favour S. 2 (2) which shifts the burden of proof and places the onus of proving bona fides on the transferor and transferee because the conditions of sub-s. (2) had not been fulfilled. But the Courts below have dealt with all the transfers on the footing that respondent 1 had to prove that the conditions of S. 2 (2) and (3) were established, and that the onus throughout was on him. The decision that respondent 1 had satisfied this onus which was arrived at by the Courts in Cyprus, the Judges of which have a knowledge of local conditions and habits which their Lordships do not pretend to possess, is not one which they would lightly interfere with. But they feel satisfied on a consideration of all the evidence and documents that it is a right conclusion, and that the judgment should be affirmed.

But it is still necessary to consider the application of the appellant for a new trial on the various grounds suggested. These can best be considered separately. The first objection is that the judgment appealed from is a nullity on the ground that the acting President of the District Court was not competent to sit but was disqualified because he had been Official Receiver when the petition against Vassiliades was filed and had expressed an opinion adverse to the appellant in another case. This objection alleges bias and want of impartiality on the part of the Judge. It is a most serious objection, the effect of which, if it is sustained, is that the trial must be held to have been *coram non iudice* and the judgment a nullity. The simplest type of bias is where the Judge is shown to have any pecuniary interest in the result of the proceedings: in that case it will be held at once that he is disqualified, however small the interest and however clear it may be that his mind could not have been affected. A striking illustration of this type is afforded by (1852) 3 H. L. C. 759,¹ where that fact that the Lord Chancellor who presided at the hearing in the House of Lords had inadvertently

failed to disclose a small interest he had in the respondent company was held to vitiate the judgment of the House. But there are other circumstances which may be relied upon as justifying an objection that a Judge is disqualified for bias. It is then a question of substance and fact whether the objection is good. In (1894) 1 Q. B. 750,² Lord Esher at p. 759 explained the criterion for rejecting the objection to be

"not that any perversely minded person cannot suspect him but that he must bear such a relation to the matter that he cannot reasonably be suspected of being biassed."

That was a case in which bias was alleged on the ground that the person adjudicating had actively co-operated in bringing the charges which were being investigated, but the Court held that as he had taken no part in the prosecution, the objection of bias failed. In the present case the acting President of the District Court had taken no part in or in regard to the proceedings to set aside the transfers, either when he was Official Receiver or in any other capacity. Nothing is alleged or suggested to show that he was not capable of bringing an entirely impartial mind to the hearing of the particular application. No reasonable person could think that he was biassed or "in substance and in fact" liable to be even suspected of bias merely because in the past in an official position he had dealt with matters in which the appellant was concerned. Their Lordships agree with the Supreme Court in rejecting this objection. It might perhaps have been better if the hearing had been adjourned until the Governor had dealt with the application to him to nominate another Judge. It is always highly desirable that any proceeding should be dealt with by persons who are above any suspicion, however unreasonable, of being biassed. But as the proceedings have been in fact held, they cannot be set aside except on legal proof of bias, of which there is none. The other matters of objection are fully dealt with and rejected by the Supreme Court, who have thus summed up their conclusion:

"On the whole we cannot think the proceedings were satisfactory, but all the difficulties appear to have arisen from the peculiar conduct of the appellant and her different advocates. And if she feels aggrieved it appears to us the fault was hers and that of her brother and lawyer Afxentis Vassiliades, that the case did not move on more smoothly. And as grounds of appeal we do not think we can consider them as such, considering the whole behaviour of her and her legal advisers."

Broadly, their Lordships take the same view. It is a matter of public policy that justice should not merely be done but should appear to be done. Judges, however, are only human,

1. (1852) 3 H. L. C. 759, *Dimes v. Grand Junction Canal Coy.*

2. (1894) 1 Q. B. 750, *Allinson v. General Medical Council.*

and their patience is sometimes sorely tried by counsel and litigants. It is always to be regretted if their patience even appears to give way. But the administration of justice depends on the co-operation of the Judges and the parties. Parties cannot complain whose improper or unreasonable conduct has led to a departure from the more regular course of procedure, so long as no substantial injustice is done. Their Lordships do not think it necessary to examine in detail all the complaints made on behalf of the appellant. It may be enough to say that, after carefully examining into them, their Lordships are satisfied that there has been no substantial miscarriage of justice. Only if they had been so satisfied could a new trial be ordered. One objection taken was that the District Court stopped the cross-examination of a witness by the appellant's brother, a barrister who at one stage appeared on her behalf. After it had lasted three hours, (it is true through the medium of an interpreter), the Court stopped it as irrelevant. Now cross-examination is one of the most important processes for the elucidation of the facts of a case and all reasonable latitude should be allowed, but the Judge has always a discretion as to how far it may go or how long it may continue. A fair and reasonable exercise of his discretion by the Judge will not generally be questioned by an appellate Court. As Lord Sankey L. C. said in (1935) A. C. 346³ at page 360,

"A protracted and irrelevant cross-examination not only adds to the cost of litigation, but is a waste of public time."

The Lord Chancellor went on to say that such a cross-examination may become indefensible. Before their Lordships the appellant's counsel did not suggest that any material cross-examination had been prevented. This ground of objection is, in their Lordships' opinion, ill-founded. It is not easy to follow all the peculiar features of the conduct of the appellant in Court or of her counsel, who changed from time to time. For instance, there appears to have been no sufficient reason why her brother Afxentis, who had appeared as her counsel and then gave evidence as her witness, refused at the outset of his cross-examination to answer a relevant question on the pretext that he had not finished his examination in chief. He was then committed for contempt and ordered to pay a trifling fine, with the alternative of a month's imprisonment. His tone is reported to have been angry and his demeanour disrespectful. Another of the appellant's counsel had already withdrawn. The appellant was asked if she desired to call wit-

nesses or address the Court, but she did not, because she said she had no advocate. She did not even herself give evidence.

Objections were taken to the form of the judgments in the lower Court. It was said that the judgment of the District Court did not sufficiently deal with all the various points which had been taken. The judgment is certainly brief and would have been more helpful to the appellate Court if it had been fuller. It is desirable that a trial Court should deal with reasonable fulness with the facts as it finds them. But the judgment of the District Court deals clearly and precisely with the essential points. The judgment of the Supreme Court is careful, full and accurate. It is, however, objected that the final words of the judgment show that the Court did not do its duty, because an appeal like the present is an appeal by way of rehearing in Cyprus as it is in England under the rules of both Courts. The words of the judgment of the Supreme Court on which the objection is based are:

"We do not think the conclusion come to by the Courts [*sc.* the District Court] was unreasonable or such as ordinary jurors could not have come to, therefore we think the appeal should be dismissed with costs."

Their Lordships, however, do not understand these words, which are not indeed very accurately expressed, as meaning that the duty of an appellate Court sitting on appeal from a Judge is the same as that of an appellate Court sitting on appeal from the verdict of a jury. In the former case the appeal is made by the rules a rehearing; the appellate judges are judges of fact. In the latter case the appellate judges are not judges of fact. As Lord Atkin said in 1935 A. C. 346³ at p. 369, speaking of a case where there is a jury,

"that tribunal and that tribunal alone is the judge of fact, and no appellate Court can substitute its own findings for those of the lawful tribunal."

The contrasted case of an appeal by way of rehearing is examined in (1935) A. C. 243.⁴ Their Lordships see no reason to think that the Supreme Court neglected its duty to rehear the case, but they have thought it better to say what they have in order to avoid any misunderstanding of what is the true rule in such appeals. Their Lordships wish finally to mention two separate matters. (1) They rejected an application on behalf of the appellant to introduce fresh evidence contained in an affidavit. It is a sufficient reason for their doing so that no explanation was given why it was not tendered in the District Court, and no proof was given that it was impossible to do so. Moreover, counsel for the appellant was unable to say that if the fresh evidence were

3. (1935) 1935 A. C. 346, *Mechanical and General Inventions Co. v. Austin Motor Co.*

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4. (1935) 1935 A.C. 243, *Powell v. Streatham Manor Nursing Home.*

admitted it would materially affect the result of the case. (2) It is said that the value of the property in question is considerably in excess of the debt to respondent 1. That matter must be dealt with by the Court in Cyprus, to whom their Lordships refer it, to do, what is just in the circumstances. On the whole case their Lordships are of opinion that the appeal fails and should be dismissed with costs. They will humbly so advise His Majesty.

R.K. *Appeal dismissed.*

Solicitors for Appellant—*Cain, Tompkins, Carter & Hill.*

Solicitors for Respondents—*Bischoff & Co.*

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(*From Supreme Court of Palestine*)

18th May 1944

VISCOUNT MAUGHAM, LORD THANKERTON
AND SIR MADHAVAN NAIR

Adel Muhammed El Dabbah—Appellant
v.

Attorney General of Palestine —
Respondent.

Privy Council Appeal No. 66 of 1943.

(a) Palestine Criminal Code Ordinance (1936),
Ss. 216 (a) and 214 — Resolution to kill within
S. 216 (a)—Proof of.

Direct evidence of a resolution to kill within
Ss. 216 (a) can seldom be found. Such resolution
will more often rest on legitimate inferences from
the proved circumstances and the conduct of the
accused. [P 44 C 2]

(b) Criminal trial — Evidence — Witnesses
named by prosecution but not called by them to
give evidence — Prosecution if bound to tender
witnesses for cross-examination by defence.

There is no obligation on the prosecution to tender
witnesses, whose names were upon the information
but who were not called to give evidence by the pro-
secution, for cross-examination by the defence. The
prosecutor has a discretion as to what witnesses
should be called for the prosecution, and the Court
will not interfere with the exercise of that discretion,
unless, it can be shown that the prosecutor has been
influenced by some oblique motive: (1857) 2 Car. & K.
520 and (1858) 1 F. & F. 79, *Approved*. [P 45 C 2]

It is consistent with the discretion of counsel for
the prosecutor that it should be a general practice of
prosecuting counsel if they find no sufficient reason
to the contrary, to tender witnesses whose names
appear at the back of indictment but are not called
by the prosecution to give evidence, for cross-exa-
mination by the defence but it remains a matter for
the discretion of the prosecutor; R. v. Nicholson and
(1927) 2 K. B. 587, *Approved*. [P 45 C 2]

Gilbert Beyfus and John Bassett —

Solicitor-General and Kenelm Preedy —

for Appellant.
for Respondent.

Lord Thankerton.—On 24th March 1943,
the Chief Justice of Palestine, sitting alone as
the Court of Criminal Assize at Haifa, convicted
the appellant of murder contrary to S. 214 (b),
Criminal Code Ordinance, 1936, and sentenced

him to death. An appeal by the appellant was
dismissed on 17th April 1943, by the Supreme
Court of Palestine, sitting as the Court of
Criminal Appeal, and the appellant, by special
leave, now appeals against that judgment.
Mr. Beyfus, in his full and able argument on
behalf of the appellant, conveniently sub-
mitted his contentions under two heads, viz.,
those which challenged the constitution of the
Court of Criminal Assize by which the appel-
lant was tried, and those which alleged grave
impropriety in the course of the trial. As re-
gards the constitution of the trial Court, the
Chief Justice sat alone by virtue of Regulation
No. 3 of the Palestine Defence (Judicial) (Regu-
lations (No. 2), 1942, which provided as follows:

"3. Whenever the Chief Justice considers it ex-
pedient so to do he may, either generally or for the
hearing of any particular case, direct that the Court
of Criminal Assize shall consist of the Chief Justice
or a British puisne judge, sitting alone, or with any
one or more judge or judges of the Supreme Court,
or with a president, or relieving president, or any
one or more Palestinian judge or judges, of the Dis-
trict Court."

At the date of making these regulations, the
constitution of the Court of Criminal Assize
was prescribed by S. 10, Courts Ordinance,
1940 (No. 31 of 1940), under which, in the ab-
sence of any application by the accused, such
Court must consist of three judges. No such
application was made by the present appellant.
Mr. Beyfus submitted that the Court of Cri-
minal Assize was not validly constituted on
three grounds, viz., (a) that regulation No. 3
already referred to which was made by the
High Commissioner under the powers vested
in him by Art. 3 of the Emergency Powers
(Colonial Defence) Order in Council 1939, and
the Emergency Powers (Defence) Act, 1939,
was not within the powers thus vested in him,
and was therefore ultra vires of the High
Commissioner; (b) that, assuming that regu-
lation NO. 3 was intra vires of the High Com-
missioner, any direction made by the Chief
Justice under it fell to be made by the Chief
Justice himself, and there was no such direc-
tion in the present case, and (c) that, in any
event, such a direction was an order within
the meaning of S. 7, Palestine Interpretation-
Ordinance, 1933 (No. 69 of 1933), which was
applied to the Defence (Judicial) Regulations,
1942, by regulation No. 9 thereof, and which
required publication in the Gazette before
such an order could have the force of law.
These submissions were raised for the first
time before this Board.

(a) It is unnecessary to refer to the Order
in Council of 1939 in detail; it is sufficient to
state that its effect was to extend the Emer-
gency Powers (Defence) Act, 1939, to Palestine,
and, for present purposes, that the parts of

S. 1 of the Act which are material may be read as originally enacted, with the substitution of the High Commissioner for His Majesty in Council. The material parts of S. 1 are as follows:

"1.—(1) Subject to the provisions of this section, His Majesty may by Order in Council make such Regulations (in this Act referred to as 'Defence Regulations') as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community."

(2)

(3) Defence Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the Regulations to make orders, rules and byelaws for any of the purposes for which such Regulations are authorised by this Act to be made, and may contain such incidental and supplementary provisions, as appear to His Majesty in Council to be necessary or expedient for the purposes of the Regulations.

(4) A Defence Regulation, and any order, rule or byelaw duly made in pursuance of such a Regulation, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act."

Counsel maintained that the discretion conferred on the Chief Justice by regulation No. 3 involved a delegation of his powers by the High Commissioner which was not authorised by sub-section (3) of S. 1 of the Act of 1939, which only authorised a delegation in general terms of the High Commissioner's power to make regulations under sub-ss. (1) and (2) of S. 1, and that, therefore, the attempted delegation in regulation No. 3 was ultra vires of the High Commissioner. Counsel also maintained that the right conferred on an accused to be tried by a Court of three by the Courts Ordinance of 1940 could not be modified or abrogated by any such regulation made by the High Commissioner, and that, in any event, the intention to modify or abrogate such a right must be made clear beyond any doubt in the regulations.

Their Lordships are unable to accept any of these contentions. In their opinion, it is clear that the High Commissioner satisfied himself that these regulations were necessary or expedient for the purposes stated in sub-s. (1) of S. 1 of the Act of 1939, and, inter alia, that a flexibility in the constitution of the Courts of criminal assize was necessary or expedient. It was rightly admitted by counsel for the appellant that he was not able to challenge the validity of the High Commissioner's conclusions. Their Lordships are of opinion that the discretion conferred on the Chief Justice involved no delegation of the High Commissioner's powers, but was an executive discretion necessary to the carrying out of the High Commissioner's conclusions. Accordingly, no

question can arise under sub-s. (3) of S. 1 of the Act. As regards the other contentions as to modification or abrogation of the appellant's right to a Court of three under the Courts Ordinance of 1940, regulation No. 3 of 1942 is clearly inconsistent with it, and, by virtue of sub-s. (4) of S. 1 of the Act, the regulation must prevail. The suggestion made by counsel that the appellant's right was not modified or affected until the Chief Justice exercised his discretion is fallacious; it was modified by the regulation as soon as it came into operation.

(b) Regulation 3 of 1942 makes no provision for the form which the direction by the Chief Justice is to take. In the present case the constitution of the Court which was to try the appellant was prescribed in the Cause List of the Supreme Court of Palestine for the week ending Saturday, 20th March 1943, which had been approved by the Chief Justice prior to Monday, 15th March 1943. Their Lordships can see no ground for suggesting that this course for fixing the constitution of the Court which was to try the appellant, and which is obviously the usual method of administering the business of the Court, was not a proper method by which the Chief Justice should exercise the discretion vested in him. (c) Section 7, Interpretation Ordinance, 1933, so far as material, provides as follows:

"7. Where an Ordinance confers power on any authority to make regulations or orders, the following provisions shall have effect with reference to the making and operation of such regulations or orders—

(d) all regulations and orders, save where otherwise provided, shall be published in the Gazette and shall have the force of law upon such publication thereof or from the date named therein."

It follows from the views already expressed by their Lordships that the direction by the Chief Justice under Regn. 3 of 1942 is not a regulation or order within the meaning of the above section, and that there was no need to publish it in the Gazette.

Their Lordships now turn to the second group of contentions raised on behalf of the appellant, which relate to the course of the trial, and are as follows:—(a) That the Chief Justice, in his judgment as finally issued by him, made material alterations in the judgment as orally delivered by him; (b) that there was no sufficient evidence before the Chief Justice to justify a finding of "premeditation" within the meaning of Ss. 214 and 216, Palestine Criminal Code Ordinance 1936, and, in any event, that the Chief Justice had neither considered this essential question, nor made any finding thereon; and (c) that the refusal by the Chief Justice, at the close of the evidence for the Crown, to rule that there was any obligation on the Crown to tender

for cross-examination by the defence, witnesses, whose names were on the information but had not been called, was wrong, and prejudiced the appellant's right to a fair trial. (a) The changes in the judgment finally issued, in view of the information obtained from the Chief Justice at the request of the Board and the limited argument submitted at the hearing before the Board, render it unnecessary for the Board to consider at length the value of the transcript by the short-hand stenographer of the oral judgment as delivered by the Chief Justice on 17th April 1943, which the learned Judge now states was full of errors and obvious mistakes, and the latter part of which had to be rewritten by him. In view of this explanation, which was not before the Court of Criminal Appeal, their Lordships would have difficulty in taking the transcript into consideration, but they are relieved from any final conclusion on this point, as the only change from the judgment as orally delivered which the appellant founds upon, is admitted by the learned Judge in his statement viz., the mention in the oral judgment of Ibrahim Bishara as a witness along with a reference to his evidence which was in fact not given at the trial, but was contained in his deposition at the preliminary enquiries, and which mention was omitted in the judgment finally issued. This point was raised before the Court of Criminal Appeal, and their Lordships agree with their view that, apart from this reference, which was an obvious mistake, there was sufficient evidence on which it could be found that there was enmity not only between the villages but also between the families of the deceased and the appellant, and that this alteration in the judgment cannot be regarded as a substantial one, which would affect the conclusions arrived at by the learned Judge. (b) The appellant was charged under S. 214 (b), Criminal Code Ordinance, as having "with premeditation" caused the death of the deceased, and S. 216 provides as follows:

"216. For the purpose of S. 214 of this Code a person is deemed to have killed another person with premeditation when—

(a) he has resolved to kill such person or to kill any member of the family or of the race to which such person belongs provided that it shall not be necessary to show that he resolved to kill any particular member of such family or race, and

(b) he has killed such person in cold blood without immediate provocation in circumstances in which he was able to think and realise the result of his actions, and

(c) he has killed such person after having prepared himself to kill such person or any member of the family or race to which such person belongs, or after having prepared the instrument, if any, with which such person was killed.

In order to prove premeditation it shall not be necessary to show that an accused person was in

any state of mind for any particular period or within any particular period before the actual commission of the crime, or that the instrument, if any, with which the crime was committed was prepared at any particular time before the actual commission of the crime."

Under this section the three essential ingredients are cumulative, and while Mr. Beyfus admitted that there was sufficient evidence to justify a finding under (b) and (c), he submitted that there was no sufficient evidence to justify a finding under (a), and that, subject to his next contention, the learned Judge misdirected himself, and the conviction under S. 214 could not be supported. It will seldom be found that there is direct evidence of a resolution to kill; such resolution will more often rest on legitimate inferences from the proved circumstances and the conduct of the accused, and, in the opinion of their Lordships, the circumstances proved in the present case and the conduct of the accused, along with the two others who accompanied him, but whose identity has not been proved, afford ample ground for a finding that the appellant resolved to kill the deceased. The Court of Criminal Appeal, holding, in effect, that the Chief Justice had pronounced no finding as to premeditation, and forming an independent view of their own upon the evidence, stated, "it is quite clear to our minds that the irresistible inference—the only inference possible from the facts of this case—is that this killing was done with premeditation."

While not accepting their criticism upon the judgment of the Chief Justice, their Lordships are unable to come to any different conclusion upon the facts, which are summarised by the Court of Criminal Appeal as follows:

"That the three armed men were seen proceeding from north to south at varying distances up to a maximum of a hundred metres from the house of the deceased; that shots were fired by those armed men into the doorway of the house of the deceased; that the deceased was found lying eighteen metres from his doorway with two shots in the back; that the three armed men were seen immediately after the shots had been heard proceeding together from south to north over the road by which they had approached the scene; that there is no evidence and no suggestion that there was any provocation of quarrel; and that it was night time."

On the question of common design, they state, "Three men armed going to the scene of the crime, all returning from the scene together, all three actually shooting into the doorway of the house of the man who was eventually killed, two cartridges found showing that two shots had been fired two and a half and four metres from the place where the body of the deceased was found. From these facts it seems to this Court that common design is proved beyond a shadow of a doubt, and that no other conclusion is possible."

It is also well to bear in mind the conclusions of the Court of Criminal Appeal as to proof of enmity between the appellant and the deceased and between their families, which

have been already referred to. This evidence of enmity was also treated by the learned Chief Justice as relevant to the question of premeditation. It may be added that the appellant himself admitted that there were broken relations between the deceased and himself. The appellant's counsel submitted that, in any event, the Chief Justice had neither considered, nor made any finding on, premeditation, and the Court of Criminal Appeal would appear to have accepted this criticism to some extent. In their Lordships' opinion, the learned Judges did not pay sufficient attention to the clear and express language of the Chief Justice. The form of his judgment was provided for by S. 51 of the Criminal Procedure (Trial upon Information) Ordinance, 1933, which provides:

"51. Upon the conviction of any person for any offence the presiding judge shall, upon his notes of the proceedings, record the findings of fact on which the conviction is based:

Provided that no conviction shall be invalid for failure to include in such record a finding of a fact if such fact shall appear to be sufficiently established by the evidence given in the case."

It is only necessary to make a short quotation from the judgment of the learned Chief Justice:

"It is not necessary for the prosecution to prove a motive for a murder, but it does explain what otherwise might be unexplainable. In this case it explains the shooting in cold blood of the deceased, and it was a premeditated murder.

I therefore find that Adel, accused 1, was one of the three men who took part in this murder, and I therefore find him guilty of murder as charged... Adel Muhammad el Dabbah, as I said a few moments ago, this is a cold-blooded premeditated murder, of which I find you guilty."

The Court of Criminal Appeal does not pay attention to these findings as to premeditation, which expressly formed part of the charge, and one could not easily assume—even apart from his express reference thereto—that the learned Chief Justice had not considered this outstanding element in the law of murder in Palestine.

(c) The last contention of the appellant is that the accused had a right to have the witnesses, whose names were upon the information, but were not called to give evidence for the prosecution, tendered by the Crown for cross-examination by the defence, as was asked for by counsel for the defence, at the close of the case for the prosecution. The learned Chief Justice ruled that there was no obligation on the prosecution to call them. The Court of Criminal Appeal held that the strict position in law was that it was not necessary legally for the prosecution to put forward these witnesses, and that they could not say that the learned Chief Justice erred in point of law, but they pointed out that, in their opinion, the better practice is that the witnesses should be so tendered at the close of the case for the prosecution so that the defence

may cross-examine them if they so wish, and they desired to lay down as a rule of practice that in future this practice of tendering witnesses should be generally followed in all Courts. While their Lordships agree that there was no obligation on the prosecution to tender these witnesses and therefore this contention of the present appellant fails, their Lordships doubt whether the rule of practice as expressed by the Court of Criminal Appeal sufficiently recognises that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the Court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive; no such suggestion is made in the present case. It will be sufficient to go back to the judgment of Baron Alderson in (1847) 2 Car. & K. 520,¹ in which he said

"You are aware, I presume, of the rule which the Judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, however, should be here, because the prisoner might otherwise be misled. He might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have them in Court, but they are to be called by the party who wants their evidence. This is the only sensible rule."

In reply to the counsel for the prisoner, who asked if he was to understand that if he called them he would make them his own witnesses, Baron Alderson said,

"Yes, certainly. That is the proper course, and one which is consistent with other rules of practice. For instance, if they were called by the prosecutor, it might be contended that he ought to give evidence to show them unworthy of credit, however falsely the witnesses might have deposed."

In a later case—(1858) 1 F. & F. 79²—Baron Parke stated the correct principle to be

"that the counsel for the prosecution should call what witnesses he thought proper, and that, by having had certain witnesses examined before the grand jury, whose names were on the back of the indictment, he only impliedly undertook to have them in Court for the prisoner to examine them as his witnesses; for the prisoner, on seeing the names there, might have abstained from subpoenaing them."

He would therefore follow the course said to have been pursued by Campbell C. J., who ruled that the prosecutor was not bound to call such a witness and that if the prisoner did so, the witnesses should be considered as his own. Cresswell J., who was consulted by Baron Parke, agreed with this view.

It is consistent with the discretion of counsel for the prosecutor, which is thus recognised, that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence; and this

1. (1847) 2 Car. & K. 520, R. v. Woodhead.

2. (1858) 1 F. & F. 79, R. v. Cassidy.

practice has probably become even more general in recent years, and rightly so — but it remains a matter for the discretion of the prosecutor. Archbold, in Edn. 31, of 1943, contains a list of a series of decisions, but in none of these has the Court superseded the prosecutor's discretion. The most recent of these was an unreported case of *R. v. Nicholson*, at the Nottingham Assizes in 1937 where Hawke J. declined to force the prosecution to call a witness whom they regarded as unnecessary. Reference should also be made to an interlocutory remark by Hewart C. J., in (1927) 2 K.B. 587³ at p. 590, to the effect that

"in criminal cases the prosecution is bound to call all the material witnesses before the Court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury."

In their Lordships' view, the learned Judge could not have intended to negative the long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are. It may be noted that under s. 41 of the Criminal Procedure (Trial upon Information) Ordinance, 1933, already referred to, the Court has the right, of its own motion, to call upon persons to give evidence. This last contention of the appellant, therefore, also fails, and, on the whole matter, their Lordships are of opinion that the appeal should be dismissed, and the judgment of the Court of Criminal Appeal should be affirmed, and their Lordships will advise His Majesty accordingly.

G.N.

Appeal dismissed.

Solicitors for Appellant — *Piper Smilh & Piper*.
Solicitors for Respondent — *Burchells*.

3. (1927) 2 K.B. 587, *R. v. Dora Harris*.

A. I. R. (32) 1945 Privy Council 46

(*From Supreme Court of Island of Malta*)
19th July 1944

LORD CHANCELLOR (VISCOUNT SIMON),
LORDS WRIGHT, PORTER, SIMONDS
AND GODDARD.

Eric Reginald Charles Alexander Strologo — Appellant

v.

The King.

Privy Council Appeal No. 13 of 1944.

(a) Criminal trial — Assault — Person in uniform has no more right to assault another than anyone else.

A person in uniform, be he officer, N. C. O. or private, is no more than anyone else entitled to assault another subject of the King whether in peace or time of war. [P 47 C 1]

(b) Privy Council — Appeal — Conviction resulting from regarding as criminal act authorised by law — Privy Council will interfere and quash conviction.

If a conviction has resulted from regarding as criminal an act which is authorised by law that does amount to a breach of natural justice, because it means that there has been a conviction for what the

law does not recognise as an offence. The Privy Council will interfere in such case and quash the conviction: (1887) 12 A. C. 459, *Rel. on.* [P 48 C 1]

Frank Gahan — for Appellant.

The Attorney-General and Kenelm Preedy

— for the King.

Lord Goddard. — On 31st July 1943, the appellant was indicted before His Majesty's Criminal Court for the Island of Malta and its Dependences with having without a lawful order from the competent authorities arrested, detained or confined a person against the will of the same and of having provided a place for carrying out such arrest, detention or confinement, with the aggravating circumstances that the individual arrested detained or confined received bodily harm and with the further aggravating circumstances that the detention or confinement was continued by him with the knowledge that an order had been issued by the competent authority for the release or production of the person detained, contrary to Arts. 85 and 86 (3) and (4) of the Criminal Laws. The Court convicted the appellant of the 'substantive offence and also found both of the alleged aggravating circumstances proved. They sentenced him to 13 months imprisonment with hard labour which was the minimum sentence prescribed by law, but the Governor in the exercise of his prerogative reduced the sentence to three months. That sentence, less a remission for good conduct, has been served. The appellant by special leave granted on 25th February 1944, appealed against the conviction. At the conclusion of the argument their Lordships indicated that they would humbly advise His Majesty that the appeal should be allowed and the conviction quashed and now give their reasons for tendering such advice.

The facts were really not in dispute. The appellant is a Captain in the Royal Artillery and was acting as liaison officer with the R. A. F. at Tal Qali aerodrome. On 14th July last year, which was the third day of the invasion of Sicily, he parked a truck, a vehicle used in His Majesty's service, near a house which he had occasion to visit. On returning to the truck some time afterwards he saw the lad whose arrest formed the subject of the charge on the truck. According to the appellant the lad was in the truck and he saw him through the windscreen. The lad's evidence was that he was not in the truck, but was standing on the running board with his hands behind his back looking at the speedometer and that he had been so standing for about five minutes. Whether the Court believed the appellant's evidence on this point or preferred the somewhat surprising account given by the lad is immaterial, for it is common ground that he was at least on some part of the truck.

On seeing the appellant approach the lad ran away and the appellant chased and caught him. Unfortunately the appellant lost his temper, and hit the lad in the face and kicked him. He arrested him and took him back to the truck and put him into it. He then discovered some cigarettes were missing and that about 20 gallons of petrol had been taken out of the tank which was empty. The lad denied all knowledge of either the cigarettes or the petrol, but the appellant told him that he was taking him to Valletta police station. On the way towards Valletta they met a policeman and the appellant inquired of him where there was a police station, but then according to his evidence, realising that it was time he went on duty he drove to the aerodrome and handed over the lad to the Corporal on duty at the guard room and ordered him to detain him till the Military Police came for him. Again at the guard room he assaulted the boy. The subsequent history is really immaterial for the determination of this appeal, but it appears that the arrest caused considerable excitement in the neighbourhood which led to an Inspector of Police visiting the appellant and demanding that the boy should be released. A somewhat undignified altercation took place into which it is unnecessary to inquire in detail; it is enough to say that later in the evening the boy who had meanwhile been removed by order of the Provost Marshal to Hamrun police station was on somebody's order released. As a result of the treatment he received from the appellant the boy sustained slight injury, amounting according to the doctor's evidence to a scratch near the corner of his eye and a small scar or bruise on the leg. Had the appellant been charged with assault he would have had no defence; he would no doubt have been properly convicted and awarded a suitable punishment for that offence. It is they hope hardly necessary for their Lordships to emphasise that a person in uniform, be he officer, N. C. O. or private, is no more than anyone else entitled to assault another subject of the King whether in peace or time of war. But that was not the offence for which the appellant was convicted. He was charged and convicted under Art. 85 of the Criminal Laws, which makes it an offence to arrest, detain or confine any person without a lawful order from the competent authorities, saving the case where the law authorises private individuals to apprehend offenders. Now at this time the Malta Defence Regulations 1939 were in force throughout the Island. Those Regulations derive their statutory effect from S. 4, sub-s. (1), Emergency Powers (Defence) Act 1939, and the Emergency Powers (Colonial Defence) Order in Council

1939 made thereunder. Under Regn. 26 it is an offence to impair the efficiency or impede the working of any vehicle used or intended to be used for the purpose of any of H. M. forces. Regulation 35 provides that no person shall unlawfully enter or board any vehicle, vessel or aircraft used or appropriated for any of the purposes of H. M. service and if any person is found in any vehicle, vessel or aircraft on any occasion on which he has entered or boarded it in contravention of this paragraph then without prejudice to any proceedings which may be taken against him he may be removed by an authorised officer, which by Regn. 4 means a commissioned officer in any of H. M. forces, from the vehicle vessel or aircraft. Then by Regn. 72, among other persons, any member of H. M. forces acting in the course of his duty as such may arrest without warrant any person whom he has reasonable ground for suspecting to have committed a war offence. A war offence is an offence against any of the Regulations. Now it is clear that the appellant had reasonable grounds for suspecting that the boy had committed a war offence; he was seen on the truck and therefore was committing a breach of Regn. 35. The prohibition contained in the Regulation is absolute, no question of intent or state of mind is involved.

It follows that the appellant as a member of H. M. forces acting in the course of his duty as such was entitled under Regn. 72 to arrest him without warrant. The Attorney-General submitted that the Court was justified in thinking that he arrested the boy because he suspected him of stealing cigarettes which were his and not Government property and that accordingly there could be no justification for his action. But the facts show that he chased and arrested the boy before he knew that his cigarettes were missing, and also before he knew that petrol had been taken from the tank, so that it is unnecessary to consider whether he had reasonable grounds for suspecting that the boy had been a party at least to the theft of petrol which would have been another war offence under Regn. 26. As the Court apparently delivered no reasoned judgment their Lordships are without information as to the grounds upon which they came to the conclusion that the appellant had been guilty of an offence under Art. 85, but from the course of the trial it appears as though they must have addressed their minds solely to the question whether in arresting the boy he acted without authority, that is as a private person who was not authorised by law to apprehend an offender. The whole case for the appellant was that Art. 85 had no application because whether or not the appellant was to

be regarded as a private person he had authority under the Defence Regulations to effect an arrest. Consequently there was no illegal assumption of a power which did not belong to him. The facts do not appear to admit of any other conclusion and their Lordships therefore cannot but think that the Court acted on a misapprehension of the law and failed to take into account the powers conferred on the appellant by the Defence Regulations. The principles upon which this board acts in advising His Majesty to review proceedings in Courts of criminal jurisdiction were laid down in (1887) 12 A. C. 459¹ and have recently been re-stated so that there is no necessity to repeat them here. It is enough to say that if a conviction has resulted from regarding as criminal an act which is authorised by law that does amount to a breach of natural justice, because it means that there has been a conviction for what the law does not recognise as an offence. These are the reasons which moved their Lordships to tender the humble advice to His Majesty which they announced at the close of the argument.

G.N.

*Appeal allowed.*Solicitors for Appellant — *Norton, Ross, Greenwell & Co.*Solicitors for the King — *Burchells.*1. (1887) 12 A. C. 459, *In re Abraham Mullory Dillet.*

*** A. I. R. (32) 1945 Privy Council 48**
(*From Federal Court of India: ('43) 30 A. I. R. 1943 F. C. 36*)

6th November 1944

LORD CHANCELLOR (VISCOUNT SIMON),
LORDS ROACHE, PORTER AND GODDARD
AND SIR MADHAVAN NAIR

Emperor

v.

*Benoari Lal Sarma and others**Respondents.*

Privy Council Appeal No. 1 of 1944.

(a) Special Criminal Courts Ordinance (2 of 1942), S. 26 — Accused convicted by special Magistrate — Revision to High Court under S. 439, Criminal P. C., and application under S. 491, Criminal P. C.—Distinction—Validity of Ordinance questioned—Proper remedy is application under S. 491, Criminal P. C.

An application by way of revision to the High Court under Ss. 435 and 439, Criminal P. C., by an accused against his conviction by a Special Magistrate under the Ordinance assumes that the Court of the Special Magistrate was a valid inferior Court whose decision calls in the view of the accused for revision. But if the Special Magistrate who tried the case was a valid Court, duly authorised by the Ordinance, then by the very terms of the Ordinance there is no appeal to the High Court. If, on the other hand, the Ordinance had no validity, the Special Magistrate was in the same position as a

private person who took upon himself to conduct a trial of the accused and to sentence him to imprisonment without any authority at all. In this latter alternative, the remedy of release by process in the nature of habeas corpus (S. 491, Criminal P. C.) would be the appropriate remedy.

[P 49 C 2; P 50 C 1]

(b) Government of India Act (1935), Sch. 9 S. 72 — Whether emergency exists — Test — Governor-General is sole judge of whether emergency exists — Court cannot challenge his view.

Section 72 does not require the Governor-General to state that there is an emergency, or what the emergency is, either in the text of the Ordinance or at all and assuming that he acts bona fide and in accordance with his statutory powers, it cannot rest with the Courts to challenge his view that the emergency exists. [P 50 C 1]

The circumstances that a foreign country had declared war against India and had bombed some places in India and the earlier Ordinances had recited that an emergency had arisen which required special provision being made to maintain essential services, to increase certain penalties, to deal with looting of property left unprotected by evacuation of premises and so forth might if necessary be properly considered in determining whether an emergency had arisen but the question whether an emergency existed at the time when an Ordinance is made and promulgated is a matter of which the Governor-General is the sole judge: ('31) 18 A. I. R. 1931 P. C. 111, *Rel. on*; ('43) 30 A. I. R. 1943 F. C. 36 (*View of Rowland J.*) approved. [P 50 C 1, 2]

* (c) Special Criminal Courts Ordinance (2 of 1942), S. 1 (3)—Ordinance is not ultra vires on ground that under S. 1 (3) Governor-General did not consider that emergency existed but was making provision for future emergency or on ground that S. 1 (3) amounts to "delegated legislation."

It was contended that the Ordinance was invalid either because the language of S. 1 (3) showed that the Governor-General, notwithstanding the preamble, did not consider that an emergency existed but was making provision in case one should arise in future, or else because S. 1 (3) amounted to what was called "delegated legislation," by which the Governor-General without legal authority sought to pass the decision as to whether an emergency existed to the Provincial Government instead of deciding it for himself.

Held that (1) the Ordinance was not invalid on any of the grounds contended for. [P 51 C 1]

(2) as regards the first ground an emergency might well exist "which makes it necessary to provide for the setting up of Special Criminal Courts" without requiring such Courts to be actually set up forthwith all over India. Any other view would deny the Governor-General, when faced with an emergency, the exercise of any foresight in the protection of the state. The Governor-General may well have considered that in view of the existing emergency it was necessary to have a scheme for Special Courts drawn up and all ready for application if the existing emergency was further aggravated. It was perfectly possible, and indeed quite obvious, that the Governor-General regarded the situation on 2nd January 1942, as constituting an emergency—in view of what was happening it would be remarkable if he did not—and this justified and authorised the Ordinance providing in advance for Special Courts. It did not in the least follow that the bringing of Special Courts into actual existence and operation all over India must take place at the same time: ('43) 30 A. I. R. 1943 Bom. 169 (F. B.), approved.

[P 51 C 1]

(3) the second ground was equally unfounded. It was undoubtedly true that the Governor-General, acting under S. 72 of Sch. 9, must himself discharge the duty of legislation there cast upon him, and could not transfer it to other authorities. But the Governor-General had not under S. 1 (3) delegated his legislative powers at all. There could be no valid objection, in point of legality, to Governor-General's Ordinance taking the form that the actual setting up of a Special Court under the terms of the Ordinance should take place at the time and within the limits judged to be necessary by the Provincial Government specially concerned. This was not delegated legislation at all. It was merely an example of the not uncommon legislative arrangement by which the local application of the provision of a Statute was determined by the judgment of a local administrative body as to its necessity. [P 51 C 2]

(d) Special Criminal Courts Ordinance (2 of 1942), S. 26—In excluding revisional jurisdiction of High Court S. 26 is not ultra vires as being in conflict with S. 223, Government of India Act.

In view of S. 311 (6), Government of India Act, it cannot be said that the Governor-General when making an Ordinance in cases of emergency under S. 72 of Sch. 9, Government of India Act, is not a "Legislature" as contemplated by S. 223, Government of India Act. Provided the condition as to emergency is fulfilled, the Governor-General acting under S. 72, Sch. 9, Government of India Act, may repeal or alter the ordinary law as to the revisional jurisdiction of the High Court, just as the Indian Legislature itself might do. Therefore S. 26 of the Ordinance, in excluding the revisional powers of the High Court in cases dealt with by the Special Courts constituted under the Ordinance, is not ineffective and ultra vires as being in conflict with S. 223, Government of India Act. [P 52 C 1]

*(e) Special Criminal Courts Ordinance (2 of 1942), Ss. 5, 10, and 16—Ordinance whether ultra vires—Test—Ss. 5, 10 and 16 are not ultra vires: ('43) 30 A. I. R. 1943 F. C. 36 and ('43) 30 A. I. R. 1943 Cal. 285 (S.B.), *REVERSED*.

The question whether the Ordinance is intra vires or ultra vires does not depend on considerations of jurisprudence or of policy. It depends simply on examining the language of the Government of India Act and of comparing the legislative authority conferred on the Governor-General with the provisions of the Ordinance by which he is purporting to exercise that authority. It may be that as a matter of wise and well framed legislation it is better if circumstances permit to frame a statute in such a way that the offender may know in advance before what Court he will be brought if he is charged with a given crime; but that is a question of policy, not of law. There is nothing in the Indian Constitution to render invalid a statute, whether passed by the Central Legislature or under the Governor-General's emergency powers, which does not accord with this principle. [P 53 C 2]

Like the Parliament of Westminster the law making authority in India whether it be the Legislature or the Governor-General can validly enact that the executive authority should have the power and discretion to direct that of two Courts existing side by side the accused shall be tried in one and not in the other. [P 54 C 1]

There is nothing underlying the written Constitution of India which debars the Executive Authority, when specially authorised by the statute or Ordinance to do so, from giving directions after the accused has been arrested and charged with crime as to the choice of Court which is to try him. [P 53 C 2]

Sections 5, 10 and 16 of the Ordinance therefore are not ultra vires on the ground that they empowered the executive to decide what offences or classes of offences and what cases or classes of cases shall be tried by the Special Courts and not by the ordinary and well established criminal procedure: ('43) 30 A. I. R. 1943 F. C. 36 and ('43) 30 A. I. R. 1943 Cal. 285 (S.B.), *REVERSED*. [P 52 C 1; P 54 C 1]

(f) Interpretation of Statutes — Court is not concerned with policy involved or with results.

In construing enacted words the Court is not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used. [P 53 C 2]

N. L. C. Macaskie, Sir W. Monckton, Sir Thomas Strangman, W. Wallach and R. K. Handoo — for Appellant.

Respondents Ex parte.

The Lord Chancellor—This is an appeal by the Government of India from a judgment of the Federal Court (Varadachariar C. J. and Zafrulla Khan J., Rowland J., dissenting) dated 4th January 1943, dismissing an appeal from a judgment of the High Court at Calcutta (Sir Harold Derbyshire C. J., Khundkar and Sen JJ.) setting aside a conviction of 15 individuals by a Special Magistrate purporting to act under Ordinance No. 2 of 1942 promulgated by the Governor-General on 2nd January 1942. The ground upon which the conviction was set aside was that the Ordinance was ultra vires. The question is largely academic, for upon Ordinance 2 being declared by the Federal Court to be ultra vires, Ordinance 19 of 1943 was promulgated to replace it. But in view of the elaborate argument that has taken place and the way in which the topic has been dealt with in the judgments in India, their Lordships think that the better course is to decide the question whether Ordinance 2 is invalid, especially as this may be of assistance in deciding other questions which may arise hereafter as to the validity of Ordinances made, in cases of emergency, by the Governor-General under the authority of S. 317 and para. 72 of Sch. 9, Government of India Act, 1935.

Their Lordships must, however, make a preliminary observation on the way in which the issue of the validity of the Ordinance has been dealt with by the Indian Courts. The appeal from the Special Magistrate who convicted the accused was brought to the High Court under its criminal revisionary jurisdiction by a petition for revision under Ss. 435 and 439, Criminal P. C. This assumes that the Court below was a valid inferior Court whose decision calls, in the view of the appellants who were convicted and sentenced by it, for revision. But if the Special Magistrate who tried the case was a valid Court, duly authorised by the Ordinance, then by the very terms of the Ordinance there is no appeal to the High Court. Sen J., at the beginning of

his judgment in the High Court, points this out very clearly. If, on the other hand, the Ordinance had no validity, the Special Magistrate was in the same position as a private person who took upon himself to conduct a trial of the appellants and to sentence them to imprisonment without any authority at all. In this latter alternative, the remedy of release by process in the nature of habeas corpus (S. 491, Criminal P. C.) would be the appropriate remedy. Their Lordships content themselves with pointing this out, without seeking to dispose of the litigation on this ground, as in their opinion the matter can be satisfactorily dealt with by considering whether the objections taken to the Ordinance have any validity.

The Governor-General purported to make and promulgate the Ordinance under a power conferred on him by para. 72 of Sch. 9, Government of India Act, 1935. That paragraph—which must, of course, be read in the light of the India and Burma (Emergency Provisions) Act, 1940 (whereunder the operation of the words “for the space of not more than six months from its promulgation” was suspended during the period therein specified)—provides as follows :

“72. The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any Ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature ; but the power of making Ordinances under this section is subject to the like restrictions as the power of the Indian Legislature to make laws ; and any Ordinance made under this section is subject to the like disallowance as an Act passed by the Indian Legislature, and may be controlled or superseded by any such Act.”

It is to be observed that the paragraph does not require the Governor-General to state that there is an emergency, or what the emergency is, either in the text of the Ordinance or at all, and assuming that he acts bona fide and in accordance with his statutory powers, it cannot rest with the Courts to challenge his view that the emergency exists. In the present instance, such questions are immaterial, for at the date of the Ordinance (2nd January 1942) no one could suggest that the situation in India did not constitute an emergency of the most anxious kind. Japan had declared war on the previous 7th December ; Rangoon had been bombed by the enemy on 23rd December and again on 25th December : earlier Ordinances had recited that an emergency had arisen which required special provision being made to maintain essential services, to increase certain penalties, to deal with looting of property left unprotected by evacuation of premises, and so forth. Their Lordships en-

tirely agree with Rowland J.'s view that such circumstances might, if necessary, properly be considered in determining whether an emergency had arisen ; but, as that learned Judge goes on to point out, and, as had already been emphasised in the High Court, the question whether an emergency existed at the time when an Ordinance is made and promulgated is a matter of which the Governor-General is the sole judge. This proposition was laid down by the Board in 58 I. A. 169¹ and is plainly right. On 3rd September 1939, the date on which war was proclaimed between His Majesty and Germany, the Governor-General, acting under S. 102, Government of India Act, 1935, had proclaimed that “a grave emergency exists whereby the security of India is threatened by war” and thereupon the Indian Legislature acquired power to make laws for a province with respect to any of the matters enumerated in the “Provincial Legislative List,” with the result that the Governor-General, acting under para. 72 of Sch. 9, had in case of emergency the same width of Legislative power.

Two objections, however, were raised to the validity of the Ordinance in connexion with the question of “emergency.” The Ordinance recited that “an emergency has arisen which makes it necessary to provide for the setting up of special criminal Courts,” and the body of the Ordinance contained the necessary framework for Courts of criminal jurisdiction consisting of Special Judges, Special Magistrates and Summary Courts, the provisions as to their respective limits of jurisdiction and procedure, together with restrictions on appeal (which fall to be separately considered in this judgment), but the Ordinance did not itself set up any of these Courts, but provided by S. 1, sub-s. (3) that the Ordinance

“shall come into force in any Province only if the Provincial Government being satisfied of the existence of an emergency arising from any disorder within the Province or from a hostile attack on India or on a country neighbouring on India or from the imminence of such an attack, by notification in the official Gazette, declares it to be in force in the Province, and shall cease to be in force when such notification is rescinded.”

In view of this last provision, it was contended that the Ordinance was invalid either because the language of the section showed that the Governor-General, notwithstanding the preamble, did not consider that an emergency existed but was making provision in case one should arise in future, or else because the section amounted to what was called “delegated legislation,” by which the Governor-General without legal authority sought to pass

1. (31) 18 A. I. R. 1931 P. C. 111 ; 12 Lah. 280 : 58 I. A. 169 : 131 I. C. 415 (P. C.), Bhagat Singh v. Emperor.

the decision as to whether an emergency existed to the Provincial Government instead of deciding it for himself. There is, in their Lordships' opinion, no valid ground for either of these contentions. As regards the first one, it is enough to say that an emergency may well exist which "makes it necessary to provide for the setting up of Special Criminal Courts" without requiring such Courts to be actually set up forthwith all over India. Any other view would appear to deny to the Governor-General the possibility, when faced with an emergency, of making provisions which could be instantly applied if the danger increased and became even more critical to the part of India where it was necessary to apply them. It would in fact (as Beaumont C. J. observed in reference to a similar objection in the Bombay High Court, in *I. L. R. (1943) Bom. 331*² at p. 351), deny to the Governor-General, when faced with an emergency, the exercise of any foresight in the protection of the State. He may well have considered that, in view of the existing emergency, it was necessary to have a scheme for Special Courts drawn up and all ready for application if the existing emergency was further aggravated. A very similar situation arose in this country when, under the Emergency Powers Act, the Government devised and prepared for instant application a system of Zone Courts which were to be put into force only if, owing to invasion by the enemy or the like, the ordinary Courts in some part of the country were judged unable to function satisfactorily. Sen J. in the High Court expressed the opinion that

"the provisions of this Ordinance proclaim unmistakably that the Governor-General did not think that an emergency which necessitates the Ordinance actually existed. He may have thought that such an emergency may arise at some future time. That, however, is not enough. The Governor-General had no power to promulgate this Ordinance unless he was of opinion that the emergency requiring it actually existed; it is therefore ultra vires of the Governor-General."

With all respect to the learned Judge, their Lordships are quite unable to accept this reasoning: it is perfectly possible, and indeed it is quite obvious, that the Governor-General regarded the situation on 2nd January 1942, as constituting an emergency — in view of what was happening it would be remarkable if he did not — and this justified and authorised the Ordinance providing in advance for Special Courts. It does not in the least follow that the bringing of Special Courts into actual existence and operation all over India must take place at the same time.

2. ('43) 30 A. I. R. 1943 Bom. 169 : *I. L. R. (1943) Bom. 331* : 207 I. C. 147 (F.B.), *Shreekanth Pandurang v. Emperor*.

The second objection has attracted more support, but is, in their Lordships' opinion, equally unfounded. It is undoubtedly true that the Governor-General, acting under para. 72 of Sch. 9, must himself discharge the duty of legislation there cast upon him, and cannot transfer it to other authorities. But the Governor-General has not delegated his legislative powers at all. His powers in this respect, in cases of emergency, are as wide as the powers of the Indian Legislature which, as already pointed out, in view of the proclamation under S. 102, had power to make laws for a Province even in respect of matters which would otherwise be reserved to the Provincial Legislature. Their Lordships are unable to see that there was any valid objection, in point of legality, to the Governor-General's Ordinance taking the form that the actual setting up of a Special Court under the terms of the Ordinance should take place at the time and within the limits judged to be necessary by the Provincial Government specially concerned. This is not delegated legislation at all. It is merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity. Their Lordships are in entire agreement with the views of the Chief Justice of Bengal and of Khundkar J. on this part of the case. The latter Judge appositely quotes a passage from the judgment of the Privy Council in the well-known decision in (1882) 7 A. C. 829.³ In that case the Canadian Temperance Act, 1878, was challenged on the ground that it was ultra vires of the powers of the Parliament Act of Canada. The Temperance Act was to be brought into force in any county or city, if upon a vote of a majority of the electors of that county or city favouring such course, the Governor-General by Order in Council declared the relative part of the Act to be in force. It was held by the Privy Council that this provision did not amount to a delegation of legislative power to a majority of the voters in a city or county. Their Lordships said :

"The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons powers to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada, when the subject of legislation is within its competency. . . . If authority on the point

3. (1882) 7 A. C. 829, *Charles Russell v. The Queen*.

were necessary, it will be found in the case of (1878) 3 A. C. 889⁴ lately before this board."

The next objection to be considered is the contention that S. 26 of the Ordinance, which is framed to exclude the revisional and appellate powers of the High Court in cases dealt with by the Special Courts constituted under the Ordinance, was ineffective and ultra vires as being in conflict with S. 223, Government of India Act, 1935. Section 223 provides :

"Subject to the provisions of this part of this Act, to the provisions of any Order in Council made under this or any other Act, and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred upon that Legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court . . . shall be the same as immediately before the commencement of Part 3 of this Act."

Previous to 1935 the High Court had revisional jurisdiction over the Magistrates' Courts in the relevant area. The argument advanced was that this jurisdiction could not be taken away by an Ordinance made by the Governor-General under para. 72, as the Governor-General's Ordinance was not an "Act of the appropriate Legislature." "Legislature," it was said, only means the Central Legislature consisting of the two Houses and the Governor-General, or the Provincial Legislature consisting of the two Houses and the Governor, and the Governor-General when making an Ordinance in cases of emergency under para. 72 was not either of these Legislatures. The argument, as Sir Harold Derbyshire pointed out in his judgment, overlooked the provision in S. 311 (c) of the Act, which says :

"Any reference in this Act to . . . Acts or laws of the Federal or a Provincial Legislature, shall be construed as including a reference to an Ordinance made by the Governor-General."

There is, thus, no substance in this objection. Assuming that the condition as to emergency is fulfilled, the Governor-General acting under para. 72 may repeal or alter the ordinary law as to the revisional jurisdiction of the High Court, just as the Indian Legislature itself might do. There remains to be considered another objection to the validity of the Ordinance which is, as their Lordships understand, the main ground upon which it has been held to be ultra vires. The objection may perhaps be stated in more ways than one, but the substance of it, as appears both from the judgment of Sir Harold Derbyshire in the High Court and of the Chief Justice in the Federal Court, is that the Ordinance makes it possible to discriminate between one accused and another, or between one class of offence and another, so that cases may be tried either in the Special Courts or under the ordinary and well-established criminal procedure according to the direction and decision of Provincial

authorities. It is evident that this is an aspect of the matter which has greatly troubled the majority of the Judges in India who have had this case before them, and in view of the well-established practice in India by which decisions in criminal cases are open to review by a higher Court, it is natural that those who are versed in applying this system should feel disturbed by the totally different arrangement contained in the Ordinance. The following are the sections of the Ordinance which appear to have given the Judges in India most concern :

"5. A Special Judge shall try such offences or classes of offences, or such cases or classes of cases as the Provincial Government, or a servant of the Crown empowered by the Provincial Government in this behalf, may, by general or special order in writing direct . . ."

"10. A Special Magistrate shall try such offences or classes of offences, or such cases or classes of cases other than offences or cases involving offences punishable under the Indian Penal Code with death, as the Provincial Government, or a servant of the Crown empowered by the Provincial Government in this behalf, may, by general or special order in writing, direct . . ."

"14. If any question arises whether, under any order made under S. 5 or S. 10, an offence is triable by a Special Judge or a Special Magistrate, the question shall be referred for decision to the authority which made the order and the decision of that authority shall be final."

"16.—(1) A Summary Court shall have power to try such offences or classes of offences, or such cases or classes of cases as the District Magistrate, or in a Presidency-town the Chief Presidency Magistrate, or a servant of the Crown authorised in this behalf by the District Magistrate or Chief Presidency Magistrate, may by general or special order direct :

Provided that no person shall be tried by a Summary Court for an offence which is punishable with imprisonment for a term exceeding two years, unless it is an offence specified in sub-s. (1) of S. 260 of the Code.

(2) The District Magistrate or Chief Presidency Magistrate may by general or special order give directions as to the distribution among the Summary Courts within his jurisdiction of cases triable by them under sub-s. (1)."

Sir Harold Derbyshire found that the sections above quoted were invalid. He pointed out, with justice, that the Ordinance left it to the local Government, or to some officer of the local Government empowered by it in that behalf, to direct what offences or classes of offences, and moreover what cases or classes of cases, should be tried by the Special Courts. He thought that this amounted to repealing the Code of Criminal Procedure in part, for under the Ordinance there would be no trial by jury and no right of appeal and no right of revision by superior Courts, including the High Courts, such as are enacted by the Code. "In effect," he said,

"it is the Provincial Government or the District Magistrate acting not in a judicial capacity but in an administrative capacity that deprives the subject of his right under the Code and repeals its valid provisions as far as he is concerned. That, in my

4. (1878) 3 A. C. 889, *The Queen v. Burah*.

view, is repealing the Code of Criminal Procedure in part—in that instance legislation ad hoc for the man's case."

He added that he did not find authority in S. 72 to justify this result and in his view the above-quoted sections, which he declared invalid, purported to authorise persons other than the duly authorised Legislature constituted under the Government of India Act, 1935, to repeal ad hoc certain provisions of the Criminal Procedure Code and of the Letters Patent of the High Court. Khundkar J. agreed with the Chief Justice on this point and stated his objection to the above-quoted sections of the Ordinance thus:

"The result is that no man accused of an offence may know whether he is to be tried by a Court under the Code, subject to all the safeguards provided by the Code, including a right of appeal or revision under the Code, or to be tried on the mere motion of the Provincial Government or of an officer of the Crown empowered by the Provincial Government, by some one or other of the Special Courts under the Ordinance. The Provincial Government or an officer of the Crown empowered by the Provincial Government is endowed with a power that is far reaching, unfettered by rule, unconditional and subject to no supervision by the High Court or by any Court under the Code. It is a power to direct any person accused of any criminal offence to be tried by one or other of the Courts constituted under the Ordinance."

The learned Judge goes on to point out what he regards as "the possible mischief which may flow from the unwise or injudicious exercise of such a power," fortifying his criticism by quotations from well-known writers on jurisprudence such as Anson and Salmond; and he concludes that the above-quoted sections are ultra vires on the ground that the Ordinance gives to the Provincial Governments a "power to effectuate jurisdiction of Special Criminal Courts by making orders in individual cases or groups of cases." Sen J., as their Lordships understand, did not differ from the Chief Justice and Khundkar J., in this view, though he rested his decision that the Ordinance was ultra vires on other grounds which their Lordships have already indicated. In the Federal Court the Chief Justice dwelt on the value of the revisionary jurisdiction, but considered that the most serious defect in the impugned Ordinance was the power it conferred to discriminate between one accused and another by directing trial in different Courts. He developed his objections on this point by elaborate references to the constitutional principles involved in certain decisions of the Supreme Court of the United States and of the High Court of Australia, and quoted passages from the writings of Sir Courtenay Ilbert and of Sir Cecil Carr to illustrate the relation between executive and legislative powers in the British Constitution.

He concluded that Ss. 5, 10 and 16 of the Ordinance are

"open to objection as having left the exercise of the power thereby conferred on executive officers to their absolute and unrestricted discretion, without any legislative provision or direction laying down the policy or conditions with reference to which that power is to be exercised."

This was the ground upon which the Chief Justice and Zafrulla Khan J. based their decision that the appeal of the Crown should be dismissed.

With the greatest respect to these eminent Judges, their Lordships feel bound to point out that the question whether the Ordinance is intra vires or ultra vires does not depend on considerations of jurisprudence or of policy. It depends simply on examining the language of the Government of India Act and of comparing the legislative authority conferred on the Governor-General with the provisions of the Ordinance by which he is purporting to exercise that authority. It may be that as a matter of wise and well-framed legislation it is better if circumstances permit to frame a statute in such a way that the offender may know in advance before what Court he will be brought if he is charged with a given crime; but that is a question of policy, not of law. There is nothing of which their Lordships are aware in the Indian Constitution to render invalid a statute, whether passed by the Central Legislature or under the Governor-General's emergency powers, which does not accord with this principle. Rowland J., at the beginning of his dissenting judgment, collects a number of striking quotations from previous judgments delivered in the Privy Council as to the proper rule of construction. Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used. The learned Judges who were in the majority in the Federal Court would presumably not contest this proposition, and their Lordships rather understand their view to be based on the conception that there is something underlying the written Constitution of India which debars the Executive Authority, though specially authorised by the statute or Ordinance to do so, from giving directions after the accused has been arrested and charged with crime as to the choice of Court which is to try him. Their Lordships are unable to find that any such constitutional limitation is imposed. Indeed, Rowland J. points out that if it were held that where two sets of Courts exist side by side power cannot be delegated to pass an order directing that a case shall

come before the Special Court and not before the Court under the Code, this would throw doubt on a long course of legislation in India where this very thing is enacted. The learned Judge cites 13 instances, and, in addition to these, refers to the discretion conferred by the Army Act and by the Air Force Act upon the prescribed authority to decide in a particular case, where a Criminal Court and a Court martial would both have jurisdiction, before which Court the accused shall be brought for trial. There is not, of course, the slightest doubt that the Parliament of Westminster could validly enact that the choice of Courts should rest with an Executive Authority, and their Lordships are unable to discover any valid reason why the same discretion should not be conferred in India by the law-making authority, whether that authority is the Legislature or the Governor-General, as an exercise of the discretion conferred on the authority to make laws for the peace, order, and good government of India. Their Lordships will humbly advise His Majesty that the appeal should be allowed. The judgment of the Federal Court must be set aside and the Ordinance 2 of 1942 declared not to be ultra vires.

G.N.

Appeal allowed.

Solicitors for Appellant—*Solicitor, India Office.*
Respondents Ex parte.

A. I. R. (32) 1945 Privy Council 54
(From Bombay)

4th December 1944

LORD RUSSELL OF KILLOWEN
 AND LORD GODDARD AND
 SIR MADHAVAN NAIR

Ramchandra Jivaji Kanago and another
— Appellants
v.

Laxman Shrinivas Naik and another
— Respondents.

Privy Council Appeal No. 54 of 1941.

(a) Limitation Act (1908), Art. 91 — Gift — Transaction induced by undue influence is not necessarily one not made "voluntarily" within S. 122, T. P. Act — Gift voluntary but induced by undue influence — Gift is voidable and requires to be set aside — Limitation — Starting point.

If a deed of gift is a void transaction no question of cancelling, or setting it aside, would arise but if it is only a voidable transaction, that is a transaction valid until rescinded, then the necessity to set it aside is obvious before possession of the property can be claimed. [P 56 C 1]

The fact that the transaction of gift was brought about by undue influence does not necessarily mean that it was not made "voluntarily" within the meaning of S. 122, T. P. Act, and is therefore void. Where the donor wished to make a gift and acted voluntarily in making it but the transaction was

induced by undue influence, the gift is only voidable and requires to be set aside before the property conveyed by it can be claimed by the donee or anyone claiming through him. Article 91 applies to such a case and when the donee was aware of the character of the transaction when he executed the deed limitation for setting aside the deed of gift would run from the date of the gift because under Art. 91 time runs from the date of the knowledge and not from that of the removal of the undue influence: ('34) 21 A.I.R. 1934 P. C. 130, *Rel. on.* [P 56 C 1, 2]

(b) Limitation Act (1908), S. 10—Applicability.

Section 10 applies only to a case of property which has become "vested in trust for a specific purpose" and therefore it can have no application to a case where property is held by a donee under a deed of gift which was obtained by undue influence.

[P 56 C 2]

J. M. Parikh, P. V. Subba Row and A. Ghaffur
— for Appellants.

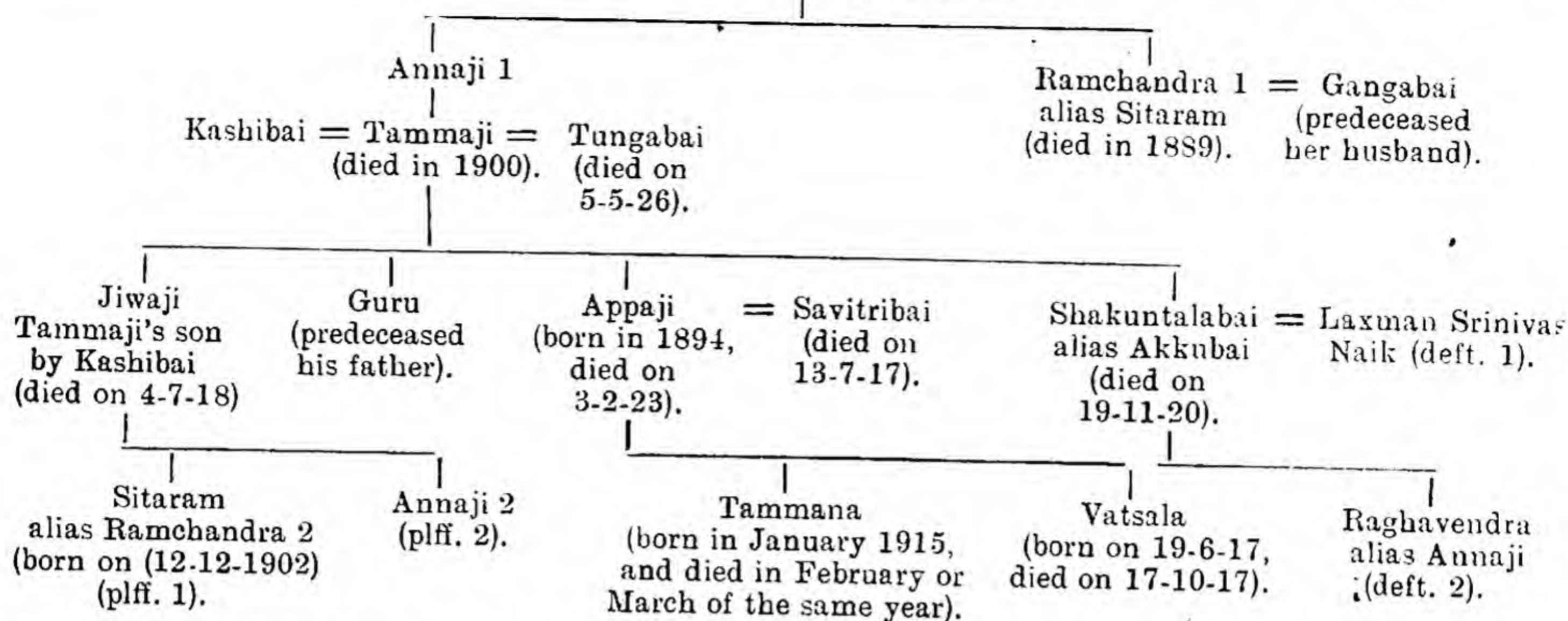
Respondents Ex parte.

Sir Madhavan Nair — This is an appeal from a decree dated 17th March 1937 of the High Court of Judicature at Bombay, which reversed a decree dated 23rd April 1932 of the Court of the First Class Subordinate Judge of Belgaum and dismissed the plaintiff's suit. The question for determination in the appeal is whether the plaintiffs' (appellants') suit for recovery of possession of the suit properties is barred by Art. 91, Limitation Act, 1908 (Act 9 of 1908). This article prescribes a period of "three years" for a suit "to cancel or set aside an instrument not otherwise provided for"; and time begins to run "when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him." The table given below shows the relationship of the parties to the suit who are members of a Hindu family descended from one Balaji Kanago:

(For Table see page 55)

Balaji had two sons, Annaji 1, Ramchandra 1. As found by the High Court they separated in 1865. The elder, Annaji, died leaving a son Tammaji. The suit giving rise to this appeal was instituted by plaintiffs 1 and 2. Ramchandra 2 and Annaji 2, the two sons of Jiwaji who was the son of Tammaji, against respondent 1 Laxman who was defendant 1, and his minor son Raghavendra, respondent 2 who was defendant 2. It was alleged in the plaint that the suit properties belonged to Appaji, son of Tammaji by Tungabai, that Appaji died without leaving surviving him either a widow or any issue, that on his death his mother Tungabai succeeded to his properties, and that on her death the plaintiffs as the nearest reversioners to Appaji were entitled to the properties in the suit. Tungabai died in 1926 and the suit was instituted in 1927.

Defendant 1 is the husband of a sister of Appaji named Shakuntalabai alias Akkubai



deceased, and defendant 2 is their son. In the joint written statement which they filed, they stated that the plaintiffs were adopted by Ramchandra 1 in the genealogical table, that defendant 2 was adopted by Tungabai after the death of Appaji, and that he was therefore a nearer heir to Appaji as he became his brother by Tungabai's adoption. As regards this plea, it may be stated at once that the Courts in India have held that Jiwaji was not the adopted son of Ramchandra 1. It would therefore follow that the alleged adoption of defendant 2 was in law invalid for the reason that in the presence of the plaintiffs, the grandsons of Tammaji, his widow had no power to make any adoption to him. These questions are not now before the board.

The defendants contended further that Appaji had made a gift of the suit properties to his sister Shakuntalabai by a deed of gift dated 24th May 1915 that she left the same to her son defendant 2 by her will dated 16th November 1920 which she had made before she died on 19th November 1920 and that defendant 1 as the guardian of his son came into possession of those properties. The plaintiffs met this plea with the case that Appaji was induced to execute the deed by the undue influence of defendant 1 and his wife Shakuntalabai and that therefore the gift was invalid. Lastly, the defendants pleaded that the plaintiffs' suit was barred by limitation. Issues 5, 6 and 9 which are as follows, relate to the validity of the gift set up by the defendants and their plea of limitation.

"Issue (5) Is the gift by Appaji to Shakuntalabai proved?"

(6) If so, do plaintiffs prove that it was brought about by undue influence?"

(9) Is the plaintiffs' suit in time?"

On the above issues, the Subordinate Judge found that the gift was proved, but that it was not proved that it was made by Appaji "voluntarily" within the meaning of S. 122, T. P. Act (Act 4 of 1882) which says

"gift is the transfer of certain existing movable or immovable properties made voluntarily and without consideration ;"

that it was proved that it was caused by the undue influence of defendant 1, exercised upon Appaji, that it was void, that Art. 91, Limitation Act, did not apply and that the suit was in time under Art. 141 which prescribes a period of 12 years for a

"like suit" by a Hindu or Mahomedan entitled to possession of immovable properties on the death of a Hindu or Mahomedan female from the time when the female dies."

"Like suit" in the article means a suit for recovery of immovable property. In the result, the Subordinate Judge gave the plaintiffs a decree for possession of the suit properties with mesne profits and costs. The learned Judges of the High Court held that the gift was brought about by the undue influence exercised on Appaji by defendant 1 and also by Shakuntalabai, but they held differing from the Subordinate Judge that it was made "voluntarily"

"as Appaji may have probably executed the deed 'voluntarily' in the sense that he expected to die and wished to benefit his beloved nephew"

though in doing so, he acted under the influence of his sister and her husband. As the transaction was, in their view, voidable and not void, they held that Art. 91 applied to the case and time began to run against Appaji who was aware of the character of the transaction from the date of the document, viz., 24th May 1915 and that the suit was barred as it was brought beyond three years from that date. They also held that S. 10, Limitation Act, also relied on by the plaintiffs would not apply to the case. In the result, they allowed the appeal and dismissed the plaintiffs' suit with costs.

Having regard to the findings of the High Court which their Lordships find no reason to reject, the main question for determination before the board, as stated already, is whether

the suit is barred by Art. 91, Limitation Act. If the deed of gift is a void transaction no question of cancelling, or setting it aside, would arise, but if it is only a voidable transaction, that is, a transaction valid until rescinded, then the necessity to set it aside is obvious before possession of the property can be claimed. Mr. Parikh's first argument was that as the transaction in question was brought about by undue influence as found by the Courts in India, it was not voluntary and was therefore void as a gift within the meaning of S. 122, T. P. Act. This argument cannot be accepted. Though the transaction was induced by undue influence it does not necessarily follow that it was not made "voluntarily." As held by the learned Judges of the High Court, it is clear to their Lordships that Appaji wished to make a gift and acted "voluntarily" in making it. Circumstances brought out in the evidence amply support this view. Appaji was a delicate boy. In 1915, he was only 20. He suffered from epilepsy. Before he made the gift he had been travelling from place to place in search of health and visiting temples. At about the time of the gift he must have realised that his health was not improving and that the prospect of having any issue was becoming more and more uncertain. It was then that he made the gift to his sister in 1915. The opinion of the High Court that he was in no way an idiot or weak-minded intellectually though he was under the influence of his sister and her husband, cannot be controverted in view of the evidence in the case. In these circumstances, their Lordships do not find any sufficient reason to differ from the opinion of the High Court that Appaji made the gift "voluntarily." The transaction is therefore not void, but only voidable as induced by undue influence and requires to be set aside before the properties conveyed by it could be claimed by Appaji or by anyone claiming through him.

Under Art. 91, Limitation Act, limitation begins to run from the time the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. It is true that Appaji became insane in or about July 1917, and continued so, until his death in 1923; but he was fully aware of the character of the transaction when he executed the deed in 1915 and before he became insane. On this point the High Court observes as follows :

"It is not shown that any of the facts which might have entitled him (Appaji) to have the gift cancelled were unknown to him—either his relationship with Laxman and Akkubai which gave them an opportunity of dominating his will, or the effect of this gift on his family and himself."

Their Lordships agree with this view. In this connexion reference may be made to the de-

cision of the Board in 61 I. A. 224¹ where it was held that time runs from the date of the knowledge and not from that of the removal of the undue influence. In that case it was held by their Lordships that

"the plaintiff not being of weak intellect was aware of the character of the transaction at the date when it was entered into"

and that time began to run from that date. It follows therefore that, in this case, time began to run against the plaintiff from the date of the gift and that their claim was barred by limitation at the date of the suit.

It was also argued by the learned counsel for the appellants that, inasmuch as the properties in the suit were obtained by undue influence, having regard to Ss. 88, 89 and 95, Trusts Act, (Act No. 2 of 1882), the donee and her successor, defendant 2 should be considered to be holding the properties, as if they were "trustees" of the same and the suit to recover their profits will not be barred by time, having regard to S. 10, Limitation Act, which says :

"... no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his, or their, hands such property or proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

Their Lordships do not think it is necessary to examine this argument beyond saying that as S. 10, Limitation Act, applies only to a case of property which has become "vested in trust for a specific purpose" which certainly is not the case here, that section can have no application to the present case. For the above reasons, their Lordships would humbly advise His Majesty that this appeal should be dismissed, but without costs as the respondents have not appeared before the Board.

G.N.

Appeal dismissed.

Solicitors for Appellants — *Harold Shephard.*

Respondents Ex parte.

1. ('34) 21 A. I. R. 1934 P. C. 130: 9 Luck. 178: 61 I. A. 224 : 149 I. C. 480 (P. C.), Someshwar Dutt v. Tirbhawan Dutt.

A. I. R. (32) 1945 Priyy Council 56

(From Patna)

11th December 1944

**LORDS RUSSELL OF KILLOWEN,
MACMILLAN AND SIMONDS,
SIR MADHAVAN NAIR AND
SIR JOHN BEAUMONT.**

Secretary of State — Appellant

v.

Ambalal Khora and others —

Respondents.

Privy Council Appeal No. 23 of 1943 ; Patna Appeal No. 18 of 1941.

Land Acquisition (Mines) Act (18 of 1885) — “Lying under the land” explained.

The natural meaning of the words “lying under” or “underlying” between which there is no difference, is lying vertically under. Hence the words “minerals lying under the land” in the Act can mean nothing else than minerals lying vertically under the land. [P 59 C 2]

Held that the area of waiver extended only to coal vertically under the land the area of which is so defined and did not extend to mines which must be left unworked for the lateral support of such land. [P 59 C 2]

H. Wynn Parry, Sir Thomas Strangman and W. W. K. Page — for Appellant.

R. Ritson — for Respondents.

Lord Simonds. — This appeal, which is from a judgment dated 8th May 1941, of the High Court of Judicature at Patna, arises out of a dispute between the appellant, the Secretary of State for India as representing the Government of Bihar and Orissa and also the East Indian Railway Administration, and the respondents, the owners of a colliery known as the Khas Jheria Colliery, in regard to the compensation payable by the former to the latter for coal, the working of which was prevented or restricted under the Land Acquisition (Mines) Act (No. 18 of 1885), which will be referred to as “the Act of 1885.” In the long drawn out litigation between the parties a number of questions have been raised which are no longer at issue. The single question now remaining for decision depends on the construction of an agreement made on 11th June 1913, between the East Indian Railway Company and the predecessor in title of the respondents, by which the rights of the parties in respect of the working of coal or of compensation for leaving it unworked were adjusted and defined.

Inasmuch as this agreement specifically refers to the Act of 1885 which would itself but for the agreement between the parties have defined their rights, it is necessary to refer to its provisions.

By S. 3 (1) it is provided that when the Lieutenant-Governor makes a declaration under S. 6, Land Acquisition Act, 1870, that land is needed for a public purpose or for a company, he may, if he thinks fit, insert in the declaration a statement that the mines of coal, ironstone, slate or other minerals lying under the land or any particular portion of the land except only such parts of the mines or minerals as therein mentioned are not needed and by S. 3 (3) it is provided that if any such statement is inserted in such declaration the mines in question under the land or portion of the land so specified except as aforesaid shall not vest in the Government when the land so vests under the said Act.

1945 K/8 & 9

By S. 7 it is provided that if the person for the time being entitled to work or get any mines or minerals lying under any land so acquired is desirous of working or getting the same he shall give the Lieutenant-Governor notice in writing of his intention so to do 60 days before the commencement of working.

By S. 5 (1) provision is made for inspection by the Lieutenant-Governor after such notice and by S. 5 (2) it is provided that if it appears to the Lieutenant-Governor that the working or getting of the mines or minerals or any part thereof is likely to cause damage to the surface of the land or any works thereon he may publish a declaration of his willingness either (a) to pay compensation for the mines or minerals still unworked or ungotten or that part thereof to all persons having an interest in the same, or (b) to pay compensation to all such persons in consideration of those mines or minerals or that part thereof being worked or gotten in such manner and subject to such restrictions as the Lieutenant-Governor may in his declaration specify, by S. 5 (3) that if the declaration mentioned in case (a) is made then those mines or minerals or that part thereof shall not thereafter be worked or gotten by any person and by S. 5 (4) that, if the declaration mentioned in case (b) is made, then those mines or minerals, or that part thereof, shall not thereafter be worked or gotten by any person save in the manner and subject to the restrictions specified by the Lieutenant-Governor.

Section 6 provides that when the working or getting of any mines or minerals has been prevented or restricted under S. 5, the persons interested in those mines or minerals and the amounts of compensation payable to them respectively shall be ascertained as therein mentioned and S. 7 that, if before the expiration of the said 60 days the Lieutenant-Governor does not publish a declaration as provided in S. 5 the owner lessee or occupier of the mines may, unless and until such a declaration is subsequently made, work the mines or any part thereof in a manner proper and necessary for the beneficial working thereof as therein mentioned with a special provision for the case of damage or obstruction caused by improper working.

In these statutory provisions two things may be noticed, first, the repetition of the phrase “mines . . . or minerals lying under the land or any particular portion of the land” and, secondly, the absence of any provision in regard to mines or minerals which do not lie under any land acquired but the support of which might be necessary for such land or any works thereon. Here a sharp dis-

inction may be observed between the Act of 1885 and the familiar provisions of the so called "mining code" contained in the English Railways Clauses Act of 1845, by which elaborate provision is made in regard to the working of minerals at a prescribed distance from a railway company's undertaking. It is difficult to suppose that the distinction was not deliberate.

The facts that are relevant to the present question can now be shortly stated. In the year 1913 Khora Ramji, the respondents' predecessor in title as owner of the Khas Jheria Colliery, which included mines of coal adjacent and subjacent to the branch line of the East Indian Railway Company at and near the station of Jheria, desired to have a siding on that line constructed and maintained for the benefit of the colliery. An agreement was accordingly made between him and the Railway Company which in form consisted of two documents, the one a printed form described as "memorandum of terms for the construction of short branches and sidings for the use of collieries, mills or other industries," the other of a letter of acceptance of such terms signed by or on behalf of Khora Ramji. The date ascribed to the agreement is 11th June 1913. The printed memorandum, as its description indicates, was a common form document, of which it is necessary only to refer to cl. (6). This clause which must be set out in full is in the following terms :

"6. Surface rights only will be acquired. An applicant, if also the owner of mining rights in the land so acquired, or in land under the branch or other lines with which the siding is connected, will be allowed to work and get minerals under the said land, provided that all operations connected therewith are carried out in such a manner as not thereby to injure or to endanger the safety of the undertaking or any part thereof. The procedure laid down in the Land Acquisition Mines Act 18 of 1885 shall be strictly adhered to in regard to all proposed working of mines under such land. The applicant shall waive all claims for compensation, either from Government or the company, for any restricted working of the mines that compliance with the foregoing may entail, and shall accept entire responsibility for any accidents that may occur owing to failure to attend to these requirements. The applicant agrees by the acceptance of these terms to permit any person appointed by the company to enter and inspect and where considered necessary make plans and surveys of all workings beneath, or in the near vicinity of, the land acquired for the siding in order to see whether the precautions being taken are sufficient, and the company reserves to itself the absolute right to refuse to allow the use of its stock on any siding to which it is not satisfied that proper support has been given."

The word "undertaking" was defined by the memorandum to mean and include "all works, buildings, rolling stock and other property forming part of or appertaining to, and all rolling stock or trains passing over the railway" and the word "applicant" to mean

"the owner or leaseholder or duly constituted agent or manager of any colliery, mill, or other industrial concern, desirous of obtaining or using a siding or branch leading from the railway or who has obtained or uses such a siding or branch."

The letter of acceptance was in the following terms :

"The Agent,
East Indian Railway, Calcutta.
14924S.

Dear Sir,

Your letter No. B.10605 of 11th June 1913.

We agree to accept the above terms for the construction, working and maintenance of the siding asked for by Khora Ramji Khas Jheria Colliery, P. O. Jheria at Jheria on the East Indian Railway Jheria branch line and we understand and accept that the provisions and stipulations contained in clause 6 of the above terms extend and apply to all the mines and minerals belonging to Khora Ramji underlying the land of the branch or branches connecting the siding with the main line. Khora Ramji."

It appears that the terms of the letter which was appended to the memorandum were drafted by the railway company and submitted to Khora Ramji for his signature. Pursuant to this agreement in the year 1915 a piece of surface land, 1 bigha 6 cottahs in extent, contiguous with and to the west of the lands previously acquired for the purpose of Jheria Station, was acquired by the Government of Bihar and Orissa under the provisions of the Land Acquisition Acts. On the land so acquired a siding was constructed and used for the purposes of the colliery. The seams of coal under such land form part of the colliery. There are three seams, the top seam known as "No. 11-12 Seam" the middle seam known as "Special Seam" and the bottom seam known as "No. 10 Seam." There followed more than ten years of spasmodic controversy between the parties during which the rights of working or of compensation for not working were canvassed.

On 17th July 1930, formal intimation was given by or on behalf of Khora Ramji to the Government Chief Inspector of Mines in India of the re-opening of "11-12 Seam coal mine at our Khas Jheria Colliery." This intimation followed vain attempts to agree the form of declaration which should be issued by the Lieutenant-Governor under the Act of 1885. It resulted after a further substantial delay in the issue on 17th June 1931, of a declaration by which the Government, after reciting the acquisition of certain land for the purposes of the railway and the notice given by Khora Ramji of his intention to work No. 11-12 Seam and the inspection of the mines on behalf of the Government whereby it appeared that the working out of the coal of the mines underlying the said land was likely to cause damage to the surface of the land and to the works

constructed thereon and further reciting that Khora Ramji had agreed not to work and get minerals underlying the land acquired for their siding or underlying the land acquired for the branch or other lines with which the siding was connected or underlying the land of the branch or branches connecting the said siding with the main line in such manner as to injure or endanger the safety of the undertaking or any part thereof, were pleased to declare under cl. (b) of sub-s. (2) of S. 5 of the Act their willingness to pay compensation to all persons having an interest in the said mines lying under a portion of the land acquired under the Land Acquisition Act, 1894, which was described as coloured in pink on the plan therein referred to, in consideration of the said mines being worked or gotten in the manner and subject to the restrictions therein specified. It is not necessary to set out the restrictions: it is sufficient to say that they involved the leaving unworked of a quantity of coal which in the ordinary course would have been worked and gotten.

No steps having been taken to assess the compensation payable under this declaration, presumably because the parties could not agree the basis of such assessment, in August 1934, the suit, in which the present appeal is brought, was commenced by the respondents who claimed a declaration of their rights in respect of compensation and the appropriate further relief. It is unnecessary to deal with the numerous and intricate questions which have been raised in the course of the suit. The single outstanding question raised in this appeal is one of construction of clause 6 of the agreement of 11th June 1913, viz., to what extent was the colliery owners' statutory right to compensation waived by that clause? There being now no dispute in regard to the waiver of the right to compensation for coal unworked under the land acquired for the siding, the question may in the light of the argument before their Lordships be stated more narrowly in these terms: was the waiver of the right to claim compensation limited (as the respondents contend) to the right to claim in respect of coal lying vertically under the railway tracks in the station yard in Jheria Station or did it extend (as the appellant contends) to the right to claim in respect of coal lying beneath the adjacent land the support of which was necessary for the safety of the tracks? It is clear that except so far as it has been waived the statutory right to compensation is intact and that it is for the appellant to establish the waiver. For this purpose he can only rely on cl. 6 of the agreement. In the construction of this document their Lordships bear in mind that the parties negotiated on the basis of their

existing statutory rights and that in view of its genesis the case is one in which if there is any ambiguity the document must be construed against the appellant. The material words that have to be construed may here be repeated. They are the words in cl. 6 of the memorandum:

"An applicant if also the owner of mining rights in the land so acquired or in land under the branch or other lines with which the siding is connected will be allowed to get and work minerals under the said land provided . . ."

and the words in the letter of acceptance "and the mines and minerals belonging to Khora Ramji underlying the land of the branch or branches connecting the siding with the main line."

It is in truth not surprising that the interpretation of these words should have created difficulty. But the real difficulty appears to their Lordships to lie in the determination of the surface area intended to be covered by these words rather than in any uncertainty as to the meaning of the words "under the land" or "underlying the land" when the surface area has been ascertained. This real difficulty has been resolved by the High Court (in this respect varying the order of the learned Subordinate Judge) in these words

"therefore when the letter of acceptance is read along with cl. 6 of Ex. I (i. e., the memorandum) I think it must be taken to cover the land underlying the entire network of railway tracks within the station yard and the Jheria Railway Station."

This conclusion and the cogent reasoning that led to it have not on this appeal been the subject of serious criticism and appear to their Lordships to be well-founded. The appellant, however, seeks to enlarge the area of waiver by the claim that it extends not only to coal vertically under the land, the area of which is so defined, but also to mines which must be left unworked for the lateral support of such land. This contention has been rejected both by the Subordinate Judge and by the High Court. In their Lordships' opinion it has been rightly rejected. The natural meaning of the words "lying under" or "underlying," between which there is no difference, is lying vertically under. The bare possibility cannot be rejected of a context which would give the words a different meaning such as "lying below or at a lower level whether subjacent or adjacent," but in the document under review there is no such context. On the contrary the very clause which has to be construed refers specifically to the Act of 1885, which, except so far as its provisions are varied by agreement, defines the rights of the parties, and in that Act the words "minerals lying under the land" can mean nothing else than minerals lying vertically under the land. Here is a context fatal to the contention of the appellant. It would indeed be hard to find a distinction more

familiar to those conversant with mining law than that between vertical and lateral support. If the parties had intended that there should be waiver of a right to compensation for minerals left unworked for lateral support, they should have made it clear. They have not done so but have used familiar language apt to refer and only to refer to minerals vertically underlying a defined surface area. As the High Court justly observed (and this is the sum of the matter) "If the railway intended otherwise, then the clause should have been worded differently." For these reasons their Lordships are of opinion that this appeal should be dismissed with costs and will humbly advise His Majesty accordingly.

R.K. *Appeal dismissed.*

Solicitors for Appellant—*Solicitor, India Office.*

Solicitors for Respondents—*Hy. S. L. Polak & Co.*

**** A. I. R. (32) 1945 Privy Council 60**
(*From Oudh : A.I.R. (27) 1940 Oudh 237*)

18th January 1945

LORDS RUSSELL OF KILLOWEN,
MACMILLAN AND SIMONDS, SIR
MADHAVAN NAIR AND SIR JOHN
BEAUMONT

Lyallpur Bank Ltd. — Appellant

v.

*Ramji Das (deceased) through his sons,
and others — Respondents.*

Privy Council Appeal No. 61 of 1942; Oudh Appeal No. 8 of 1940.

**** Civil P. C. (1908), S. 73—Order under S. 186, Companies Act — Application for its execution ranks as application for execution of decree and S. 73 applies : ('40) 27 A. I. R. 1940 Oudh 237, REVERSED.**

A company which holds an order made under S. 186 (1), may resort to any procedure for its enforcement which would be open to it if the order had been a decree made in a suit, with the result that the method of enforcement provided by S. 73 of the Code is open to the company, and an application by the company for its execution must rank as an application for the execution of a decree for the purposes of that section : ('40) 27 A.I.R. 1940 Oudh 237, REVERSED; ('41) 28 A.I.R. 1941 Lah. 273, Approved; ('34) 21 A.I.R. 1934 Nag, 243, Ref.

[P 61 C 1,2]

S. P. Khambatta — for Appellant.

Phineas Quass and W. A. Hammerton —

for Respondents.

Lord Russell of Killowen.—The points involved in this appeal turn upon the true construction of S. 73 (1), Civil P. C. (5 of 1908) which is in the following terms :

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets after deducting the costs of realisation, shall be rateably distributed among all such persons."

It is common ground that at all material times there was held by the District Court, Unao, assets of one Shanti Lal amounting to a sum of Rs. 49,166 or thereabouts, and that before the receipt of those assets various decree-holders had made applications to the Court for the execution of decrees for the payment of money passed against the said Shanti Lal and had not obtained satisfaction thereof. They accordingly claimed to be entitled to a rateable distribution of the said sum under the said section. Their claims were allowed by the District Judge, Unao, who by an order dated 6th August 1936, ordered that the balance of the amount in deposit (after satisfying in full a claim of the Secretary of State for India) should be rateably distributed among the holders of 17 decrees. The appellant here had made an application for the execution of the order hereinafter mentioned, and had not obtained satisfaction thereof. It accordingly claimed a share in the rateable distribution, its claim being based upon an order which had been made in its favour under S. 186 (1), Companies Act (7 of 1913) which runs thus :

"The Court may, at any time after making a winding up order, make an order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act."

The appellant's claim was disallowed by the District Judge on the ground that its application for the execution of the said order was not an application for the execution of a decree for the payment of money, and that therefore the appellant could not share in the rateable distribution. An appeal to the Chief Court of Oudh was dismissed on the same ground. It is from this dismissal that the present appeal is brought. The order in favour of the appellant, dated 27th March 1935, was made by the District Judge, Lahore, in the following terms :

"Upon the application of the Official Liquidators of the above-named company and upon reading orders passed thereon to-day, it is ordered under S. 186 read with S. 160 of the Act that Shanti Lal son of Lala Jairam Das, o/o Lala Kundan Lal, Eastern Electric Works, Cawnpore, do pay to the Official Liquidators of the said company the sum of Rs. 1,37,557/10/3 (one lac, thirty-seven thousand, five hundred and fifty seven, annas ten and pies three) only with costs due from his late father Lala Jairam Das, the original contributory in respect of a pronote dated 1st July 1928, for Rs. 1,11,500/8/0, in favour of the above said Bank, which still remains unpaid.

This order of payment may be enforced as a decree under the provisions of Ss. 199, 200 and 201 of the Act against the estate, if any, of the deceased contributory in the hands of the above said Shanti Lal."

This order was sent for execution to the Chief Court of Oudh and was by that Court forwarded to the District Judge, Unao, in a letter addressed by the Deputy Registrar of the Court to the said District Judge in the following terms:

"I am directed to forward to your Court for execution and necessary action, the order of the District Judge In Charge Liquidation Work at Lahore, which has been certified by this Honourable Court on 27th January 1936, in the case noted on the margin."

The case was described in the margin as "No. 91 of 1936. Civil Miscellaneous Application Register. In the matter of the Indian Companies Act 7 of 1913 and of *The Lyallpur Bank Ltd. (in Liquidation), Decree-holder v. Lala Shanti Lal, Judgment-debtor.*" Among the documents which accompanied the letter was a "certificate of non-satisfaction of decree."

The ground upon which the judgments of the Courts in India were based was the same in each Court, viz., that an order made under S. 186, Companies Act, did not come within the definition of the word "decree" contained in S. 2 (2), Civil P. C., and therefore that a holder of such an order could not fulfil the requirement of S. 73 of being within the class of persons who had "made application to the Court for the execution of decrees." The Courts in coming to their conclusions were following the decision which had been reached in the case in A.I.R. 1934 Nag. 243.¹

From any point of view this result, if right in law, would appear strange. It would mean that a company resorting to the short and simple procedure against a contributory which S. 186 invites it to adopt, would be depriving itself of an effective method of enforcing its claim which would have been available had it resorted to the longer and more elaborate procedure of a suit. In their Lordships' opinion however the Courts in India have, in the present case, taken too narrow a view. The strange result indicated above is avoided if and when S. 36 of the Code and S. 199, Companies Act, or either of them, are, or is, taken into consideration. Section 199, Companies Act, provides:

"Section 199. All orders made by a Court under this Act may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced."

The effect of this section is, in their Lordships' opinion, that a company which holds an order made under S. 186 (1), may resort to any procedure for its enforcement which would be open to it if the order had been a decree made in a suit; with the result that the method of enforcement provided by S. 73 of the Code is open to the company, and an

application by the company for its execution must rank as an application for the execution of a decree for the purposes of that section. Section 36 of the Code operates in the same way. By that section it is enacted:

"The provisions of this Code relating to the execution of decrees shall, so far as applicable, be deemed to apply to the execution of orders."

This section appears to their Lordships to enact that S. 73 is to be deemed to apply to the execution of an order made under S. 186, Companies Act; and if this be so, an application made to a Court for its execution must, their Lordships think, be treated as, or deemed to be, an application for the execution of a decree, notwithstanding the somewhat curious fact that, although the company is a "decree-holder" as defined by the Code, it would appear not to hold a "decree" as so defined. While there appears to have been a divergence of view in India upon this question, their Lordships find themselves in agreement with the views expressed by Young C. J. and Blacker J. in A.I.R. 1941 Lah. 273.²

In the course of the argument before the Board, it was suggested that even if an application for the execution of the order under the Companies Act must be treated as, or deemed to be, an application for the execution of a decree under S. 73 (1) of the Code, nevertheless Shanti Lal could not be said to be "the same judgment-debtor" as the judgment-debtors against whom the said 17 decrees had been passed. But an examination of the record before their Lordships showed that the 17 decrees must have been, and were in fact, treated by the District Judge as decrees passed against Shanti Lal, who was the person against whom the order under the Companies Act was made. In these circumstances no question relating to the "sameness" of the appellant's judgment-debtor can arise on this appeal. Their Lordships accordingly refrain from expressing any opinion on a question as to which, apparently, different views have prevailed in India.

In the result their Lordships are of opinion that the claim of the appellant to share in the rateable distribution of the fund ought to have been admitted. The appeal must therefore be allowed, the orders of the Chief Court and the District Judge discharged, and the matter remitted to the District Judge to adjust the rights of the parties in accordance with this judgment. The costs ordered by the Chief Court to be paid by the present appellant must (if already paid) be repaid to the appellant by the opposite parties in that Court Nos. 1 (1 to 5) 11 and 12 and No. 13, and those

1. (34) 21 A.I.R. 1934 Nag. 243 : 151 I. C. 827, Mohan Lal Lal Chand v. Bhivraj Devi Chand.

2. (41) 28 A.I.R. 1941 Lah. 273 : 195 I. C. 386 : I.L.R. (1942) Lah. 460, Radhesham Beopar Coy. Ltd. v. Karam Chand.

opposite parties must pay the costs of the appellant of its application to the Chief Court. Their Lordships will humbly advise His Majesty accordingly. The appellant's costs of this appeal must be paid by the respondent the Punjab National Bank Ltd.

R.K. *Appeal allowed.*

Solicitors for Appellant—*Harold Shephard.*

Solicitors for Respondents—*Douglas Grant & Dold.*

A. I. R. (32) 1945 Privy Council 62

(From Calcutta)

18th January 1945

LORDS RUSSELL OF KILLOWEN, WRIGHT
AND GODDARD, SIR MADHAVAN NAIR
AND SIR JOHN BEAUMONT

Doorga Prosad Chamaria — Appellant

v.

Secretary of State — Respondent.

Privy Council Appeal No. 43 of 1943; Bengal Appeal No. 12 of 1941.

(a) Practice — Relief.

The relief claimed in the suit held must be confined to matters existing at the date when the suit was instituted. [P 62 C 2]

(b) Bengal Public Demands Recovery Act (3 of 1913), Ss. 3, 4, 5 and 6—Income-tax Officer issuing certificate to Collector under S. 46, Income-tax Act — It is public demand — Certificate is under S. 4 and not S. 6—Requisition under S. 5 is not required.

Where the Income-tax Officer, purporting to act under the power conferred by S. 46 (2), Income-tax Act, addresses to the Collector a certificate certifying that a sum as tax is due from the assessee on account of income-tax, super-tax and penalty and requesting the Collector to recover the amount as if it were an arrear of land revenue, it is a public demand within the meaning of the Bengal Public Demands Recovery Act. The certificate is issued under S. 4 and not under S. 6, and no requisition under S. 5 was required. [P 62 C 2; P 64 C 1]

(c) Evidence Act (1872), S. 114, Illust. (e) — Certificate to be filed in office — Proof of, indicated.

When a statute directs a document to be filed in an office, the direction involves no formal or technical procedure. All that is required is that the document should be preserved in the office in such conditions that it can be produced when required. Hence where the certificate is stated on the face of it to have been filed, and particulars of it were registered under R. 79 of the rules under the Bengal Public Demands Recovery Act and it has been produced by the office, it is sufficiently proved that the certificate officer has caused the certificate to be filed in his office and it is not necessary to have recourse to the presumption, arising under S. 114, Illustration "E", Evidence Act. [P 63 C 2; P 64 C 1]

Where the name of the certificate-holder as Secretary of State is qualified by the words "On behalf of Income-tax Officer," the addition of the words "On behalf of Income-tax Officer" does not in any way alter or qualify the name of the certificate-holder which is given as the Secretary of State. The words do no more than indicate the nature of the demand for which the certificate is held, information more appropriate to be stated in col. 5 than in col. 2, but the inclusion of the words has no effect whatever on the validity of the certificate. [P 64 C 1]

Sir Thomas Strangman and W. W. K. Page —
for Appellant.

J. Millard Tucker and W. Wallach —
for Respondent.

Sir John Beaumont.—This is an appeal from the judgment and decree of the High Court at Calcutta, in its Civil Appellate Jurisdiction, dated 16th January 1941, by which the decree of the First Subordinate Court of Howrah, dated 31st July 1936, was set aside. The only question which arises in the appeal is whether a certificate dated 1st April 1933, issued under the provisions of the Bengal Public Demands Recovery Act, 1913, is a valid certificate. The appellant in his case claims further that the certificate, if originally valid, became unenforceable by reason of matters which occurred after the filing of the suit; but their Lordships are of opinion that the relief claimed in this suit must be confined to matters existing at the date when the suit was instituted.

On 27th February 1933, the appellant was assessed to income-tax and super-tax by the Income-tax Officer, Howrah, under the provisions of the Income-tax Act, 1922, for the years 1928-29, 1929-30 and 1930-31, the assessments being made under the provisions of S. 23, sub-s. (4). Notices of demand were issued and tax for the year 1928-29 was paid by the appellant, but the tax for the remaining two years remained due. Penalties were imposed by the Income-tax Officer under S. 46, sub-s. (1), Income-tax Act, and certain recoveries were made. It is not necessary to consider these matters in detail since it is not the appellant's case that nothing was due from him at the date of the disputed certificate, and the exact amount due is not in issue in this appeal. On 29th March 1933, the Income-tax Officer, purporting to act under the power conferred by S. 46, sub-s. (2), Income-tax Act, addressed to the Collector a certificate certifying that the sum of Rs. 3,86,529-1-0 due from the appellant on account of income-tax, super-tax and penalty was in arrear, and requesting the Collector to recover the amount as if it were an arrear of land revenue. The effect of this certificate was to make the claim against the appellant a public demand within the meaning of the Bengal Public Demands Recovery Act, 1913, by virtue of S. 3, sub-s. (6) of the Act and cl. (3) of Sch. 1. The relevant provisions of the Bengal Public Demands Recovery Act, 1913, and the Rules made thereunder are as follows:

Section 4 provides that when the certificate officer is satisfied that any public demand payable to the Collector is due he may sign a certificate in the prescribed form stating that the demand is due and cause the certificate

to be filed in his office. Section 5 provides that when any public demand payable to any person other than the Collector is due, such person may send to the certificate officer a written requisition in the prescribed form. Section 6 provides for the recovery of a demand in respect of which a requisition has been made under S. 5. Section 7 provides that when a certificate has been filed in the office of a certificate officer under S. 4 or S. 6, he shall cause to be served upon the certificate-debtor, in the prescribed manner, a notice in the prescribed form and a copy of the certificate. Section 9 enables the certificate-debtor within the time limited to present a petition to the certificate officer denying liability, in whole, or in part, and S. 10 provides for the hearing of such petition. Section 34 empowers the certificate-debtor at any time within six months from the service upon him of the notice required by S. 7 or if he files a petition under S. 9 denying liability from the date of the determination of the petition to bring a suit in the civil Court to have the certificate cancelled or modified. Section 35 states the grounds on which a certificate may be cancelled or modified by the civil Court. By S. 38 the rules in Sch. 2 are given statutory effect.

Rule 79 provides that every Certificate Officer shall cause to be kept in his office a register of certificates filed in his office under the Act and shall cause particulars of all such certificates to be entered in such register, and R. 84 provides that the forms set forth in the appendix shall be used with such variations as circumstances may require. On 1st April 1933, the Certificate Officer of Howrah signed a certificate, stated to be under Ss. 4 and 6, Bengal Public Demands Recovery Act. The certificate stated on its face that it was filed in the office of the Certificate Officer of Howrah, and followed the form given in the appendix to the Act. In col. 2 the name of the certificate holder was stated to be "Income-tax Officer, Howrah" and in col. 4 the amount of the demand was stated to be Rs. 3,86,529-1-0 and in col. 5 the particulars given were "Income-tax and penalty." On the same day the Certificate Officer ordered the issue of notice under S. 7 of the Act, and on 1st May the appellant filed objections to the certificate proceedings under S. 9 of the Act. On 1st August the Certificate Officer passed orders holding the certificate to be invalid, but this order was set aside by the Collector on 7th September 1933, and the case was remanded to the Certificate Officer. The order of the Collector was finally upheld by the Commissioner on 18th December 1933. On 7th September 1933, the Certificate Officer passed the following orders: Amend the certi-

ficate and put down Secretary of State for Income-tax Officer, Howrah, in col. 2 of the certificate, and reduce the amount of the certificate by Rs. 3875 as in the petition of 27th June 1933. Issue notice under S. 7, Public Demands Recovery Act, upon the debtor at once.

These orders were duly carried out, but the officer making the amendments seems to have understood the direction to put down Secretary of State for Income-tax Officer as meaning that the name of the Secretary of State was to be entered on behalf and not in the place of that of the Income-tax Officer. Accordingly in col. 2 the name of the Certificate Officer was entered as "Secretary of State on behalf of Income-tax Officer, Howrah," and in col. 4 the amount of the debt was reduced by Rs. 3875. On 17th February 1934, this suit was filed and the relief claimed was (1) A declaration that the certificate lodged by the defendant before the Certificate Officer, Howrah, on 1st April 1933, was illegal and void and inoperative; (2) An injunction restraining the defendant from enforcing or attempting to enforce the said illegal certificate; (3) An account of all monies realised by the defendant under the said illegal certificate and refund thereof to the plaintiff; (4) Release from civil prison. It will be observed, therefore, that the relief claimed is limited to a declaration that the certificate of 1st April 1933, is illegal, void and inoperative and for consequential relief, but there is no claim for modification of the amount alleged to be due on the certificate if valid.

At the trial the Subordinate Judge at Howrah decreed the plaintiff's suit holding that the certificate of 1st April 1933, was void since no order was shown to have been made for its filing, and the name of the certificate holder was wrongly given since the name of the Secretary of State should have appeared without qualification. On appeal the High Court of Calcutta reversed this decision and dismissed the plaintiff's suit for reasons with which their Lordships are in substantial agreement. The validity of the certificate has been challenged before the Board on four grounds: First it is said that the Certificate Officer did not cause the certificate to be filed in his office, since he offered no evidence of any order having been made directing the certificate to be filed. In their Lordships' opinion there is no substance in this objection. When a statute directs a document to be filed in an office, the direction involves no formal or technical procedure. All that is required is that the document should be preserved in the office in such conditions that it can be produced when

required. In the present case the certificate in question is stated on the face of it to have been filed; particulars of it were registered under R. 79, and it has been produced by the office, and the original was before their Lordships. In those circumstances, their Lordships hold it sufficiently proved that the Certificate Officer caused the certificate to be filed in his office and it is not necessary to have recourse to the presumption, arising under S. 114, *illust. "E"*, Evidence Act.

The second objection is that there was no requisition under S. 5. Their Lordships agree with the view taken by the High Court that the money was payable to the Collector and accordingly the certificate was issued under S. 4 and not under S. 6 and no requisition under S. 5 was required. The third objection relates to the name of the certificate holder as appearing in the certificate. It is admitted by the appellant that if the monies were payable to the Collector the name of the certificate holder should be the Secretary of State for India, but it is objected that the name should be without qualification, and that in the certificate in question the name is qualified by the words "On behalf of Income-tax Officer, Howrah." In their Lordships' opinion the addition of the words "on behalf of Income-tax Officer Howrah" does not in any way alter or qualify the name of the certificate holder which is given as the Secretary of State. The words do no more than indicate the nature of the demand for which the certificate is held, information more appropriate to be stated in col. 5 than in col. 2, but the inclusion of the words in their Lordships' opinion, has no effect whatever on the validity of the certificate. The last objection to the certificate is that in col. 4 no period for which the demand is due was stated as required by the heading to that column. In their Lordships' opinion, although income-tax may be popularly described as due for a certain year, it is not in law so due. It is calculated and assessed by reference to the income of the assessee for a given year, but it is due when demand is made under S. 29 and S. 45. It then becomes a debt due to the Crown, but not for any particular period. In the result their Lordships agree with the conclusion arrived at by the High Court of Calcutta and they will humbly advise His Majesty that this appeal be dismissed with costs.

R.K.

*Appeal dismissed.*Solicitors for Appellant — *W. W. Box & Co.*Solicitors for Respondent — *Solicitor, India Office.***A. I. R. (32) 1945 Privy Council 64***(From Lahore)*

6th December 1944

LORD CHANCELLOR, LORDS RUSSELL OF KILLOWEN, PORTER AND GODDARD AND SIR MADHAVAN NAIR

Kishori Lal — Appellant

v.

Emperor.

Privy Council Appeal No. 15 of 1944.

Penal Code (1860), Ss. 53, 38 — Prisoners Act, Ss. 29, 31, 32 — Person sentenced to transportation not sent to Andamans is not entitled to release after 14 years.

A prisoner sentenced to transportation may be sent to the Andamans or may be kept in one of the Jails in India appointed for transportation prisoners where he will be dealt with in the same manner as a prisoner sentenced to rigorous imprisonment. Hence a person lawfully sentenced to transportation for life and confined in a prison which had been appointed as a place to which prisoners so sentenced might be sent is not entitled to be discharged after 14 years even assuming that the sentence is to be regarded as one of 20 years, and subject to remission for good conduct. [P 66 C 2; P 67 C 1]

*D. N. Pritt and R. K. Handoo — for Appellant.**G. D. Roberts and J. M. Pringle — for the Crown.*

Lord Goddard.—On 7th October 1930, the appellant was convicted before the Special Tribunal set up under Ordinance 3 of 1930 of certain offences, including those of waging war against the King, contrary to S. 121, Penal Code, and of murder, contrary to S. 302. For these offences he was sentenced to transportation for life which is the only sentence, other than death, which can be awarded for these two crimes. After conviction he was imprisoned in the Central Jail at Multan and in January 1936, was transferred to the Central Jail at Lahore. On 29th August 1932, the Home Secretary to the Government of the Punjab wrote to the Inspector-General of Prisons saying that the Governor in Council agreed that the appellant, on the score of his crime, was unsuitable for transportation to the Andamans adding that "he cannot be deported as a terrorist as the Government of India has not so far addressed any communication authorising the Punjab Government to deport terrorists there." The Andamans is the only place outside the mainland of India to which convicts sentenced to transportation are sent and it is not in dispute that this letter signified the intention of the Government not to transport the appellant overseas but to keep him imprisoned in India. In fact, he has ever since been kept in the Central Jail at Lahore, and has there been dealt with in the same manner as if sentenced to rigorous imprisonment. His sentence has never been commuted under S. 55, Penal Code, or S. 402 (1), Criminal P. C., to

one of rigorous imprisonment. While there is no section either in the Penal Code, or in the Code of Criminal Procedure, which says in terms that no sentence of rigorous imprisonment is to exceed 14 years, it is the fact that in no case where rigorous imprisonment is prescribed as the punishment is the maximum term longer than 14 years and, by a proviso to S. 35 (2) of the latter Act, consecutive sentences of imprisonment cannot amount in the aggregate to more than 14 years. So it can be said with truth that when the Code enacts that an offence shall be punishable by rigorous imprisonment as the sentence it cannot exceed that period. The only sentence known to the law which can exceed 14 years is one of transportation for life and, with two exceptions where transportation is a part of the sentence, the term is always for life. Convicts serving this sentence may be granted remission for good conduct, and for the purpose of calculating remission in the case of life sentences, it appears that in India they are treated as sentences of 20 years. This is no doubt the reason why S. 57 of the Code provides that for calculating a fractional part of a life sentence it should be treated as one of 20 years.

On 1st July 1943, the position was that the appellant had earned remission and, if the amount thus earned were added to the term he had actually served, the aggregate would have exceeded 14 years but would not have exceeded 20 years. On that date he applied to the High Court at Lahore for an order in the nature of a habeas corpus under S. 491, Criminal P. C., claiming that he had justly served his sentence and should therefore be released. His application was refused by Monroe J. on 13th July. On appeal the High Court held that they had no jurisdiction to entertain it as being one in relation to a criminal matter, and it is conceded that this view was correct. Subsequently, special leave to appeal to His Majesty in Council from the order of Monroe J. was granted as it was clear that a question of importance and some difficulty was involved.

The appellant's main contention was, and is, that as he has all along been subjected to rigorous imprisonment he cannot be made to serve longer than a term, which, aggregated with the period of remission earned, amounts to 14 years, that being the maximum term of rigorous imprisonment permitted by law. He also contends that the Government by causing him to be dealt with in the same manner as if sentenced to rigorous imprisonment must be deemed to have commuted his sentence under S. 55, Penal Code. The contention of the Government is that they can confine a prisoner sentenced to transportation in any pri-

son appointed by them for that purpose there to be dealt with as though sentenced to rigorous imprisonment, but that this does not affect the length of the sentence unless it has been commuted, and the present appellant's sentence never has been commuted. It is therefore necessary to examine the various statutory provisions dealing with the sentence of transportation.

Section 53, Penal Code, sets out six different punishments to which offenders are liable. The second of these is transportation and the fourth imprisonment of two descriptions, rigorous and simple. As already stated, where the Penal Code prescribes transportation as the punishment, the sentence, with two exceptions must be for life. By S. 55, in every case in which a sentence of transportation for life shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced, may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding 14 years. Section 58 provides that in every case in which a sentence of transportation is passed the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be held to have been undergoing his sentence of transportation during the term of his imprisonment. Were these the only statutory provisions dealing with the matter, there would be much force in the argument that S. 58 should be read as providing merely for the temporary or transitory detention and treatment of an offender while arrangements were being made for his transportation beyond the seas. If the history of the sentence be examined there is no doubt that when first enacted transportation meant transportation beyond the seas. When framing the Penal Code, the draughtsmen undoubtedly intended this sentence to remain as one whereby those on whom it was passed should be sent overseas. This appears in the introduction to the Code, the author of which was Mr.—afterwards Lord—Macaulay, then Legal Member of Council and a principal draughtsman of the Act. The Code was drafted about 1836 but was not enacted until 1860 and at that time also the sentence involved the convict being sent out of India. In 1836, transportation was a common sentence in England for felony and one reason for thinking that S. 58 was intended by the authors of the Code to provide only for temporary detention of prisoners awaiting transportation is that the English Act, 24 Geo. IV, Ch. 84, which consolidated the law of this country relating to transportation, contained a very similar provision. Shortly stated that Act provided that the sentence

should always be one of transportation or banishment beyond the seas; that places on land or vessels in the river (commonly called the hulks) should be appointed for the confinement of prisoners until they could be placed on a convict ship and that until they could be removed to such places they were to be kept to hard labour in the common jail or house of correction and the time spent there was to be counted towards their sentence. Opinions, however, on matters of penology change from time to time in all communities, and no one doubts the competency of the Legislature to adopt and provide for new and enlightened methods in the treatment of prisoners and management of penal establishments, even if the result be to change entirely the character of the punishment from that which has hitherto prevailed. In England transportation beyond the seas ceased as a punishment in 1854. In India it is still part of the penal system, but Acts passed since the Penal Code have effected so radical a change in the law relating thereto that whatever may have been the case in 1860, S. 58 can no longer be construed as providing only for the transitory detention of prisoners awaiting conveyance to a penal settlement outside India. A sentence of transportation no longer necessarily involves prisoners being sent overseas or even beyond the provinces wherein they were convicted. The first provision to notice in this respect is S. 368 (2), Criminal P. C., 1898, which enacts that no sentence of transportation shall specify the place to which the person sentenced is to be transported. Then comes the Prisoners Act of 1900 as amended in 1903 which, in the opinion of their Lordships, is the decisive statute on the point. Section 29 in its amended form provides as follows :

"(1) The Governor-General in Council may by general or special order, provide for the removal of any person confined in a prison. . . .

(b) Under, or in lieu of, a sentence of imprisonment or transportation to any other prison in British India.

(2) The Local Government and subject to its orders and under its control the Inspector-General of Prisons may in like manner provide for the removal of any person confined as aforesaid in a prison in the province to any other prison in the province."

By S. 31, the Governor in Council may order the removal of a person sentenced to transportation from the prison in which he is confined to any other prison in British India. By S. 32, as amended in 1920, the Local Government may appoint places within the province to which prisoners under sentence of transportation shall be sent and the Local Government or an officer authorised by them shall give orders for the removal of such persons to the places so appointed except where sentence of transportation is passed on a per-

son already undergoing transportation under a sentence previously passed for another offence. Since 1937, all the above powers can now be exercised by Provincial Governments.

The effect of the concluding words of S. 32, sub-s. (1), seems to be that if a prisoner has been actually transported and then is sentenced on a subsequent charge he is to remain where he is and not be removed thence to a place within the province. The Central Jail at Lahore, in which the appellant is confined, is one of the prisons constituted as a place for the detention of transportation prisoners. These sections make it plain that when a sentence of transportation has been passed it is no longer necessarily a sentence of transportation beyond the seas. Nowhere is any obligation imposed on the Government either of India or of the Provinces to provide any places overseas for the reception of prisoners. It appears that for many years the only place to which they have been sent is the Andaman Islands, which are now in Japanese occupation. Their Lordships have been referred to various orders and directions of an administrative and not a legislative character showing what prisoners are, and are not, regarded as fit subjects for transportation thereto, and showing also that nowadays only such of those prisoners sentenced to transportation as may volunteer to undergo transportation overseas are sent to those islands. Learned commentators on the criminal law of India, in particular Lord Macaulay, in the introduction to the Penal Code to which reference has already been made, have pointed out that a sentence of transportation is one likely to be regarded with particular terror by Hindoos, largely because of their dread of crossing "the black water," the loss of caste which a journey overseas entails and of the uncertainty whether they will ever see their homes again. No doubt therefore the sentence has been preserved for its deterrent effect and because in certain cases it may be both useful and desirable to send convicts to the islands. But at the present day transportation is in truth but a name given in India to a sentence for life and, in a few special cases, for a lesser period, just as in England the term imprisonment is applied to all sentences which do not exceed two years and penal servitude to those of three years and upwards. A convict sent to penal servitude may nowadays serve his sentence either in a prison known as a convict establishment or in an ordinary local prison and in the latter he will be subject to exactly the same discipline, conditions of labour and treatment generally as those sentenced to imprisonment. So, in India, a prisoner sentenced to transportation may be sent to the Andamans or may be kept in one of the jails in

India appointed for transportation prisoners where he will be dealt with in the same manner as a prisoner sentenced to rigorous imprisonment. The appellant was lawfully sentenced to transportation for life; at the time when he made his application to Monroe J. he was confined in a prison which had been appointed as a place to which prisoners so sentenced might be sent. Assuming that the sentence is to be regarded as one of 20 years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application and it was therefore rightly dismissed but, in saying this, their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than 20 years or that the convict is necessarily entitled to remission.

A further point was taken by Mr. Pritt on behalf of the appellant to which brief reference may be made although, in view of the opinion of their Lordships on the main question, it has now become immaterial. On the assumption that the sentence was to be regarded as one of not more than 14 years' rigorous imprisonment, he contended that taking into account the remission earned, the appellant would have been entitled to be discharged at the time when he made his application to the learned Judge under sub-para. (2) of the Government of India Resolution No. 234-245 of 12th July 1910, and Provincial Government endorsement No. 236 of 25th August 1910 reproduced as para. 647, sub-para. (2), in the Punjab Jail Manual. In view of sub-para. (1c) the Board caused an enquiry to be made of the Punjab Government whether any order had been passed by them forbidding the prisoner's release. In reply the Government referred to a letter of 24th March 1942, from the Deputy Secretary to the Government Home Department to the Inspector-General of Prisons, in which the former requested that the roll of the convict might be re-submitted for the further consideration and orders of Government in the first week of March 1943. That is not an order under the paragraph to which reference has been made, and if the sentence had in law to be regarded as one of 14 years' rigorous imprisonment it appears to their Lordships that the prisoner would have been entitled to be discharged. But, for the reasons given, their Lordships are of the opinion that at that time he was in lawful custody, and still is, and they will humbly advise His Majesty that this appeal should be dismissed.

R.K.

*Appeal dismissed.*Solicitors for Appellant — *Douglas Grant & Dold.*

Solicitors for Respondent —

*Solicitor, India Office.***A. I. R. (32) 1945 Privy Council 67***(From Madras)*

18th December 1944

LORDS RUSSELL OF KILLOWEN,
MACMILLAN AND SIMONDS,
SIR MADHANAN NAIR AND
SIR JOHN BEAUMONT

Marudanayagam Pillai — Appellant

v.

*Manickavasakam Chettiar —**Respondent.*

Privy Council Appeal No. 63 of 1943.

(a) Civil P. C. (1908), O. 21, Rr. 66 and 90 — Sale proclamation — Valuation of property in — Duty of Court and party applying for sale — Low valuation in sale proclamation based on misstatement by decree-holder as to amount due under prior encumbrance — Sale taking place at serious under-value occasioned by failure of Court and decree-holder to verify amount due under prior encumbrance — Judgment-debtor sustains substantial injury — Case falls under O. 21, R. 90 — Sale must be set aside.

Order 21, R. 66 imposes upon the Court the duty of causing a proclamation of the intended sale to be made and requires that such proclamation must specify, as fairly and accurately as possible, amongst other things, any encumbrance to which the property is liable. In most cases no doubt the Court has no means of checking the information supplied by the parties but the Court ought, as far as practicable, to bring its mind to bear upon the contents of the proclamation; and where material is readily available to check the information supplied by the parties the Court ought to avail itself of such material. The power conferred upon the Court by R. 66 (4) for summoning a witness for the purpose of ascertaining the matters to be specified in the proclamation shows that the Court is not intended to act blindly on information supplied by the parties. Apart from the duty cast upon the Court, R. 66 (3) provides that every application for an order for sale shall be accompanied by a statement signed and verified in the manner mentioned, and containing so far as they are known to, or can be ascertained by, the person making the verification, the matters required by O. 21, R. 66 (2) to be specified in the proclamation.

[P 70 C 1, 2]

Where the low valuation of the property to be sold in the sale proclamation was based on a misstatement by the decree-holder as to the amount due under a prior encumbrance for want of knowledge of the true position and the sale took place at a serious under-value on account of the failure on the part of the Court and the decree-holder to carry out their obligations under R. 66 to ascertain the true value of the property by finding out the correct amount due under the prior encumbrance from materials which were available the judgment-debtor must be taken to have sustained substantial injury thereby. The case falls within the language of R. 90 and the sale must be set aside if the judgment-debtor however dilatory and unsatisfactory his conduct may have been has not otherwise debarred himself of the right to have the sale set aside.

[P 70 C 2]

(b) Civil P. C. (1908), O. 21, Rr. 66, 69 and 90 — Misstatement as to value of property by decree-holder in sale proclamation — Judgment-debtor obtaining adjournment of sale and waiving right to fresh proclamation — Plea of waiver

by judgment-debtor to object to misstatement when can succeed—Fraud on Court by decree-holder—Effect of.

The low valuation of the property to be sold in the sale proclamation was based on a misstatement by the decree-holder as to the amount due under a prior encumbrance. The judgment-debtor obtained several adjournments of the sale for determination of a certain point and waived his right to a fresh proclamation on each occasion. On the application of the judgment-debtor to set aside the sale on the ground that the sale took place at a serious under-value the decree-holder contended that the judgment-debtor must have known the correct amount due under the prior encumbrance and accordingly when he waived his right to a fresh proclamation he must be taken to have accepted the statements in the existing proclamation and to have waived his right to object to them :

Held that (1) that efficacy of a plea of waiver by the judgment-debtor depended on the ability of the decree-holder to prove that the judgment-debtor knew the true facts from which an intention on his part to waive his right to object to a misstatement in the proclamation could be inferred: 3 I. A. 230 (P.C.) and 12 Mad. 19 (P.C.), *Ref.*; [P 70 C 1]

(2) if the decree-holder knew the true value of the property but deliberately under-valued it in the sale proclamation and himself purchased the property at what he knew was too low a figure based on an upset price accepted by the Court owing to his own initial misrepresentation and subsequent suppression of material facts, his conduct would amount to fraud on the Court and he would not be allowed to take advantage of his own fraud whatever the conduct of the judgment-debtor might have been.

[P 70 C 1]

J. M. Pringle — for Appellant.

C. S. Rewcastle and Air Alfred Wort —

for Respondent.

Sir John Beaumont—This is an appeal from the judgment and order of the High Court of Judicature at Madras dated 24th September 1941 which, on appeal, modified the judgment and order of the Subordinate Judge of Mayavaram dated 15th February 1939. The question in the appeal is whether a sale of immovable property, including land in the village of Tiruvali, made in execution of a mortgage decree obtained by the respondent against the appellant's predecessor is bad as regards the said land and should be so far set aside under O. 21, R. 90, Civil P. C., on the ground of material irregularity and fraud in publishing and conducting the sale.

The said mortgage was executed on 26th January 1925 by one Srirangathammal in respect of land in three villages, including that of Tiruvali, to secure the repayment within one year of Rs. 36,000, with interest at the rate of 15 per cent. per annum. The mortgagor was the widow of the last male proprietor of the estate, holding therein the limited interest of a Hindu widow, and the appellant was the next presumptive reversioner. So far as regards the land in the village of Tiruvali and certain other lands, the mortgage was expressed to be made subject to a prior mortgage

(hereinafter referred to as the "prior mortgage") dated 16th November 1924 by the same mortgagor in favour of third parties, to secure repayment of Rs. 44,500 and interest. The prior mortgage included lands not covered by the respondent's mortgage. In 1929, the mortgagees instituted a suit on the prior mortgage before the Subordinate Judge of Mayavaram joining the respondent as puisne mortgagee, and on 12th August 1929 obtained a decree for Rs. 79,238-2-6 with a direction for sale if the moneys were not paid by 12th February 1930. The realisations under this decree will be mentioned later.

In 1930, the respondent instituted a suit before the same Subordinate Judge on his mortgage, and on 7th October 1930 obtained a preliminary decree for Rs. 66,778-11-9, and on 27th July 1931 a final decree. In 1931, in a suit instituted by the appellant as next reversioner against the said Srirangathammal for an injunction to restrain her from committing waste, a receiver was appointed for the estate, and on 7th April 1931 he was added as a defendant in the suit on the prior mortgage, and on 27th July he was added as a defendant in the suit on the respondent's mortgage. On 15th December 1931, the respondent applied, under R. 66 (2) of O. 21 for execution of his decree and he annexed to his application a draft proclamation which directed that the sale should be subject to the mortgage decree obtained on the prior mortgage, and contained this statement:

"A low valuation is made as there is a prior charge of about Rs. 80,000, according to the said decree in respect of the aforesaid properties."

The value put upon the properties by the respondent amounted to Rs. 7317. In May 1932 Srirangathammal died, and the appellant was added as a defendant in the respondent's suit, the receiver having been previously discharged. On 13th September 1932 the appellant, by his pleader, adopted the answer which had been put in by the receiver in the respondent's suit and which had challenged the respondent's draft proclamation, and the appellant agreed to put in a draft sale proclamation in the way in which he would have it, and the matter was then adjourned until 6th October 1932. On 6th October the appellant's pleader asked for an adjournment, and on its refusal stated that he had no instructions to proceed with the matter. No draft proclamation was put in by the appellant, and the Court thereupon approved the draft proclamation put in by the respondent, and adopted the respondent's valuation as the upset price. On 2nd November, the Court directed that the sale should take place on 19th December. On 25th October, the appellant had made an application alleging that the widow mortgagor had no power to bind the reversion

and that accordingly the decree for sale on the respondent's mortgage could not affect the interest of the appellant, and on 16th December the appellant applied for an adjournment of the sale until this point had been determined. The Subordinate Judge thereupon adjourned the sale to 23rd January 1933 the defendant waiving a fresh proclamation. In the absence of such waiver the appellant would have been entitled to insist upon a fresh proclamation under R. 69 of O. 21. Further adjournments were obtained at the instance of the appellant, who on each occasion waived a fresh proclamation, and the sale ultimately took place on 28th March 1933. At the sale the respondent, the decree-holder, who had obtained leave to bid under R. 72 of O. 21, was the only bidder, and he purchased at Rs. 16 above the upset price. From the judgment of the learned Subordinate Judge, it appears that after the sale the prior mortgagee sold certain land subject to the respondent's mortgage for some Rs. 10,000 and that the respondent paid to him a further sum of Rs. 1000 balance due on the prior mortgage. In the result the respondent acquired free from incumbrances and at a price rather less than Rs. 20,000 property which he had valued at Rs. 7317 subject to a mortgage for Rs. 80,000.

The position under the prior mortgage appears from Ex. M.M. which is the suit register in the Subordinate Court of Mayavaram of the prior mortgage suit. It appears that in January 1931 the receiver paid into Court Rs. 3000, and in September a further Rs. 20,000 and these sums had been paid out to the decree-holder prior to December 1931. In June 1932, sales were effected in the prior mortgage suit and sums amounting to Rs. 30,444 were paid into Court and these sums were paid out to the decree-holder in July and August 1932. In November and December 1932, there were further sales for sums amounting approximately to Rs. 16,000, and this sum was paid out to the decree-holder by 4th March 1933. The position therefore is that the time when the draft proclamation was submitted by the respondent the sum of approximately Rs. 80,000 mentioned therein as due on the prior mortgage (which was correct as the sum originally due) had been reduced by a sum of Rs. 23,000. At the date when the proclamation was approved, namely, 6th October 1932 the sum had been reduced by a further Rs. 30,444, and at the date of the sale the sum had been reduced by a further Rs. 16,000, making a total reduction of Rs. 69,000.

On 19th June 1933 the appellant applied under R. 90 of O. 21 to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it. The learned

Subordinate Judge came to the conclusion that the sum of Rs. 80,000 mentioned in the proclamation as the amount due on the prior mortgage was wrong at the respective dates of presenting and settling the proclamation, and of the sale for the reasons hereinbefore stated, and that had the Court known the true facts the upset prices would have been fixed at a much higher figure, and that the appellant had been seriously prejudiced by the mistake in the proclamation. He stated that he was not prepared to hold that the respondent had been guilty of fraud in mis-stating the amount due on the prior mortgage, though he considered the case to be one of grave suspicion. He held further that there was nothing to show that the appellant was aware of the payments into Court in the prior mortgage suit.

On appeal the High Court held that there was no material irregularity in the proclamation which had prejudiced the appellant. They took the view that the only mistake in the proclamation at the time when it was presented and approved by the Court was that the figure of Rs. 80,000 should have been Rs. 67,000. They considered that the further payments into Court beyond the Rs. 23,000 must have been made in respect of sales which were challenged and the payments out must have been on some form of undertaking that the amount would be refunded if the sales were eventually set aside. Their Lordships can find nothing on the record to justify these conjectures, and the further evidence read before their Lordships on behalf of the appellant, without objection from the respondent, consisting of affidavits made in the prior mortgage suit in relation to the payments out, makes it abundantly clear that these payments were only made after the sales had been confirmed. The whole basis of the High Court's judgment therefore fails, and the reasoning has not been relied upon by counsel for the respondent. The learned Judges did not think it necessary to consider the evidence as to the state of knowledge of the parties.

The respondent based his case on waiver by the appellant, contending that the appellant must have known about the sales of his own property in the prior mortgage suit, and about the disposal of the purchase monies; that accordingly when he waived his right to a fresh proclamation he must be taken to have accepted the statements in the existing proclamation and to have waived his right to object to them, and reliance was placed upon the decisions of this Board in 3 I. A. 230¹ and

1. ('76) 3 I. A. 230 (P. C.), Girdhari Singh v. Hurdeo Narain Singh.

in 15 I. A. 171.² The efficacy of a plea of waiver by the appellant depends on the ability of the respondent to prove that the appellant knew the true facts from which an intention on his part to waive his right to object to a misstatement in the proclamation can be inferred. Their Lordships appreciate that there are reasons for suspecting that the appellant may have known more about the dealings with his property in the prior mortgage suit than he was prepared to admit, but they think that there are reasons at least equally cogent for suspecting that the respondent was in like case. The respondent was a party to the prior mortgage suit; he was presumably served with notice of the execution proceedings, and he was interested in seeing that the direction which the Court had given that property subject to the prior mortgage which was not subject to the respondent's mortgage should be sold before that subject to the respondent's mortgage was carried out. If the respondent knew the true facts, if he purchased at what he knew was too low a figure based on an upset price accepted by the Court owing to his own initial misrepresentation and subsequent suppression of material facts, his conduct would amount to fraud on the Court as the learned Subordinate Judge points out. The Court could not have allowed the respondent purchasing at a court sale to take advantage of his own fraud, whatever the conduct of the appellant might have been.

However, as already noted, the learned Subordinate Judge did not find fraud against the respondent, nor did he find knowledge on the part of the appellant requisite to found a plea of waiver, and the High Court did not disagree with these findings of fact. Their Lordships think that, whatever grounds for suspicions there may be, there is no material on the record which would justify the Board in disregarding the findings of fact by the Subordinate Judge who had seen the witnesses, including the appellant himself, in the witness box. Their Lordships therefore will dispose of the appeal on the basis that neither the appellant nor the respondent at the material dates knew the position under the prior mortgage.

Order 21, R. 66 imposes upon the Court the duty of causing a proclamation of the intended sale to be made and requires the proclamation to be drawn up after notice to the decree-holder and the judgment-debtor and such proclamation must specify, as fairly and accurately as possible, amongst other things, any encumbrance to which the property is

liable. In most cases no doubt the Court has no means of checking the information supplied by the parties but the Court ought, as far as practicable, to bring its mind to bear upon the contents of the proclamation; and where material is readily available to check the information supplied by the parties the Court ought to avail itself of such material. In the present case all the facts relating to the prior mortgage could have been ascertained by an inspection of the suit register on the files of the Court. When the proclamation was settled, and again when the sale took place, it might well have occurred to the officer of the Court responsible that it was unlikely that nothing had occurred in the prior mortgage suit since its inception, even if he did not re-call having himself sold properties in that suit, and that it was desirable to check the figure of Rs. 80,000. The power conferred upon the Court by R. 66 (4) for summoning a witness for the purpose of ascertaining the matters to be specified in the proclamation shows that the Court is not intended to act blindly on information supplied by the parties. Their Lordships think that the Subordinate Court cannot be acquitted of a measure of carelessness in not having checked this figure of Rs. 80,000 both when the proclamation was approved and when the sale subsequently took place. Apart from the duty cast upon the Court, R. 66, sub-r. (3) provides that every application for an order for sale shall be accompanied by a statement signed and verified in the manner mentioned, and containing so far as they are known to, or can be ascertained by, the person making the verification, the matters required by sub-r. (2) to be specified in the proclamation.

It is clear that the respondent if he did not know the position in the prior mortgage suit could easily have ascertained it, seeing that he was a party to the suit, which was in the same Court. The position therefore is that this sale took place at a serious under-value occasioned by failure on the part of the Court, and of the respondent decree-holder, to carry out their obligations under R. 66, and there can be no doubt that the appellant sustained substantial injury thereby. Their Lordships are of opinion that the case falls within the language of R. 90 and that, however dilatory and unsatisfactory the conduct of the appellant may have been, he has not on the facts found debarred himself of the right to have the sale set aside. Their Lordships will humbly advise His Majesty that this appeal be allowed, the order of the High Court be set aside and the order of the Subordinate Judge be restored. The respondent must pay to the appellant his costs of the appeal to the

2. ('89) 12 Mad. 19 : 15 I. A. 171 : 5 Sar. 265 (P. C.), Arunachellam Chetti v. Arunachellam Chetti.

High Court and of the appeal to His Majesty in Council.

G.N.

Appeal allowed.

Solicitors for Appellant — *Lambert & White.*

Solicitors for Respondent —

Douglas Grant & Dold.

A. I. R. (32) 1945 Privy Council 71

(*From Patna*)

18th December 1944

LORD THANKERTON, LORD JUSTICE LUXMOORE AND SIR MADHAVAN NAIR

Devji Goa and others — Appellants

v.

Tricumji Jiwandas and others —

Respondents.

Privy Council Appeal No. 5 of 1943; Patna Appeal No. 40 of 1939.

(a) Practice—New plea.

A plea not raised in the Courts below was not allowed to be raised in the Privy Council. [P73C 1]

(b) Partnership — Dissolution — Partnership with firm — Separation or death of some members of firm cannot amount to dissolution.

Where a partnership with a firm has gone on as a living concern continuously since the time it was started, the separation or death of some members of the firm, others—their sons or grandsons—taking their place, cannot amount to dissolution, as the other partners have presumably agreed to treat as partners the remaining members of the firm or such members as were added to it from time to time.

[P 73 C 1]

(c) Practice — Counsel assenting to his client being made party in double capacity — Withdrawal of assent was refused.

Counsel for a party assented to his party being joined as a legal representative of his father and also in his personal capacity but a few days after the conclusion of the arguments asked leave to withdraw his assent :

Held that leave should be refused. [P 74 C 1]

(d) Civil P. C. (1908), O. 30, R. 1 and O. 1, R. 10 — Family firm entering into partnership with strangers — Two members of family firm retiring as insolvents—One member being minor only admitted to benefits — Only one effective member remaining — Suit by such member in firm name for dissolution of partnership held not maintainable.

A family firm entered into partnership with strangers. A suit for dissolution was brought by the family firm in the firm name. At the time of the institution of the suit, two of the family members had retired being adjudicated insolvents, one being minor was only admitted to the benefits of the partnership and only one member remained, who could be an effective member of the family firm :

Held that O. 30 R. 1 did not apply as the business was carried on outside British India. Even if O. 30, R. 1 applied the suit in the firm name was not maintainable. (Proper form of title of plaint indicated.) [P 73 C 2 ; P 74 C 1]

C. S. Rewcastle and W. W. K. Page —

for Appellants.

Sir Thomas Strangman and A. G. P. Pullan —

for Respondents.

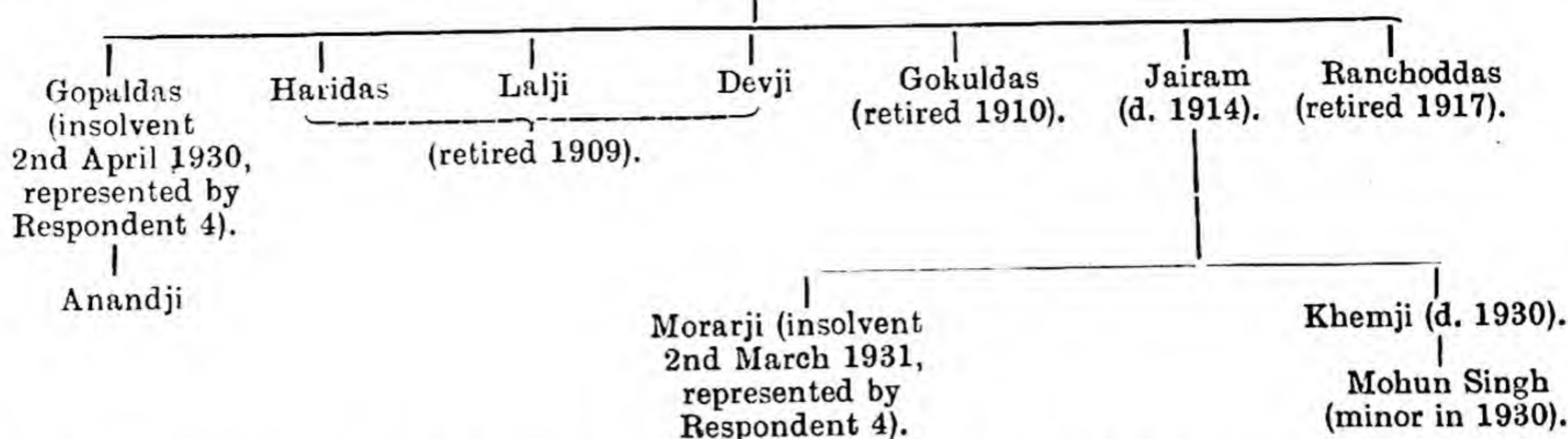
Sir Madhavan Nair.—This is an appeal from a decree of the High Court of Judicature at Patna dated 24th August 1939, which affirmed with a slight modification a decree of the Subordinate Judge of Dhanbad dated 29th March 1934, as amended by order dated 31st May 1934. The appellants before the Board are defendants 1 to 3, who are the sons of one Goa Petha deceased. They are the principal defendants in the suit. The others (defendants 4, 5 and 6) are pro forma defendants one of whom, defendant 4, the Official Assignee of Bombay, representing the estate of Gopaldas Tricumji, and Morarji Jairam, insolvents, was afterwards added as a co-plaintiff (plaintiff 4) by an order of the Court. The insolvents are two of the members of plaintiff 1—a firm.

The appeal arises out of a suit for dissolution of a partnership between plaintiff 1 and Goa Petha, with respect to some coal lands and colliery business in Jharia Coalfields, and for rendition of accounts. The business of the partnership was carried on at Cutch, outside British India. Plaintiff 1 "Tricumji Jivandas" is described in the plaint as a firm. Plaintiff 2, "Khimji Poonja Co." are a firm who have a charge on the share of plaintiff 1, in the lands and business, for the money advanced by them to the said plaintiff. This charge was declared by the Bombay High Court in suit No. 751 of 1924. Plaintiff 3 had been appointed receiver in connexion with that suit. These are the principal respondents in the appeal, and there is no dispute inter se before the Board.

One Tricumji Jivandas, a native of Cutch who died in or about 1890, carried on business in various places in his own name. After his death, the business was continued by seven of his eight sons, named in the sub-joined table and their descendants, by a succession of partnerships to which they gave his name, Tricumji Jivandas. In course of time some members died or retired and the firm was carried on by the other members of the family. Gopaldas Tricumji was the managing partner of the firm. The following table, and the dates mentioned below, taken from the printed case of the respondents, will be helpful in following the successive partnerships.

(*See pedigree on page 72.*)

Haridas, Lalji and Devji retired in 1909 Gokuldas retired in 1910. Jairam died in 1914 leaving two sons, Morarji and Khemji, who became partners on their father's death. Ranchoddas retired in 1917. Anandji, the son of Gopaldas, became a partner in or about 1922. Khemji died in 1930 leaving a minor son Mohun Singh who was admitted to the bene.



fits of the partnership in his father's place. Gopaldas was adjudicated insolvent on 2nd April 1930. Morarji was adjudicated insolvent on 2nd March 1931. Referring to plaintiff 1, it was stated in para. 1 of the plaint that "its present partners, besides the said Gopaldas Tricumji (one of the sons of Tricumji Jivandas) are his nephews Morarji Joyram and Mohan Singh Khemji and his son Anandji Gopaldas, who is the present managing partner of the firm." These were the only members of the Tricumji family, who had interests in the firm at the time of the institution of the suit, on 11th December 1931, but whether, in law, they can be said to represent the partnership for the purposes of carrying on the suit, in the name of plaintiff 1 described as "Tricumji Jivandas a firm," is a question which their Lordships will have to consider in this appeal.

The following facts are now beyond dispute: In the year 1900, the firm of Tricumji Jivandas entered into a partnership with Goa Petha, the father of the appellants, and one Bishram Karman, to acquire lands in Jharia Coalfields and work them as a colliery. The shares of Tricumji Jivandas and Bishram Karman were $1\frac{1}{2}$ annas each, and the share of Goa Petha was $13\frac{1}{4}$ annas. In case of profit, one anna was to be spent on charity. Thus, the income was to be taken as $17\frac{1}{4}$ annas, if there was profit, and $16\frac{1}{4}$ annas only if there was no profit. The funds for working the business were supplied by Tricumji Jivandas, and the management was carried on by Goa Petha. In 1930, the share of Bishram Karman came into the hands of the appellants, who bought it from one Kora Ramji who had purchased it from the said Bishram Karman. The name of this new business was G. P. C. & Co., and it really consisted of two partners, the firm plaintiff 1, and Goa Petha. At the time of the institution of the suit 180 bighas of colliery land belonged to the partnership.

The accounts of the partnership were made up to November 1918. Tricumji Jivandas received on account of profits Rs. 13,500 in 1921 and Rs. 10,000 in 1924. Goa Petha died in March 1930, and from that time his sons, the

appellants worked the colliery. The suit was instituted on 11th December 1931. As stated already, it was for dissolution of partnership and for accounts. The plaintiffs (respondents) stated that the accounts of the partnership were adjusted only up to 1918, since which time they said there was no formal adjustment though Tricumji Jivandas received profits now and again up to 1924.

The main defences in the case were, that there was no partnership as alleged by the respondents, that the suit was barred by limitation and that it was not maintainable in law. The Subordinate Judge overruled the above pleas and passed a decree in favour of the plaintiffs declaring that "in the partnership business carried on in the style of G. P. C. & Co. in the Khas Jinagora Colliery, the firm of Tricumji Jivandas had $1\frac{1}{2}$ annas share in the property and business, and it dissolved in March 1930, by the death of Goa Petha," and directing accounts to be rendered by the appellants from November 1918, and a sale of the partnership property in accordance with O. 20, R. 15 and Form No. 21 of Appendix D of Sch. (1), Civil P. C. Provision was also made for drawing up a "final decree." On appeal, the High Court accepted the findings arrived at by the trial Court, and affirmed the decree passed by it subject to this modification, namely, that the liability of the appellants for the moneys due up to the death of Goa Petha should be confined "to the assets of Goa Petha which may have come into their hands." In other respects, the decree of the Subordinate Judge was confirmed. Before the board, the findings of fact arrived at by the Courts in India have not been questioned by the appellants. The main point argued by their learned counsel was, that the suit was not maintainable in the form in which it was brought before the trial Court, and that it should therefore be dismissed. They also very briefly addressed their Lordships on the question of limitation and the nature of the decree passed in the case. Their Lordships will first deal with the latter arguments, reserving the consideration of the main question to the last.

On the question of limitation, the Courts

in India found that there was no repudiation of partnership by Goa Petha in 1924 as alleged, that even if there was a repudiation it was not serious and it did not matter as the partnership continued till his death, and that limitation for the suit began only from the time when he died in March 1930, and as the suit was instituted in 1931, it was not barred by time. If these findings are accepted, as they have been, by their Lordships, Mr. Rewcastle conceded that no question of limitation would arise; but he argued that in the circumstances of the case, it must be held that when the partnership was formed there was a contract by Goa Petha that he would prepare and render accounts annually, that as soon as he failed to render them in any year, there was a breach of contract for which the plaintiffs have a remedy under S. 12, Specific Relief Act, that the suit should be treated as one for the specific performance of a contract, and when so treated, it was barred by Art. 113, Limitation Act, the period of limitation for such a suit being "three years" from "the date fixed for the performance or when no such date is fixed when the plaintiff has notice that the performance is refused." As regards this argument, their Lordships need only say that it was not raised in the Courts below and cannot now be allowed to be raised here. Their Lordships are also of opinion that having regard to the nature of the partnership which went on as a living concern continuously since the time it was started, that separation or death of some members of the firm, others—their sons or grandsons—taking their place, cannot amount to dissolution, as Goa Petha presumably agreed to treat as partners the remaining members of the firm or such members as were added to it from time to time. As their Lordships are definitely of opinion that the cause of action for the suit arose only on the death of Goa Petha they do not think it is necessary to refer to the other aspects in which the question of limitation was placed before them, though they have considered them.

A subsidiary question argued by Mr. Rewcastle was, that the decree should be varied and that it should be brought into line with the form of the decree suggested in (1876) 1 A. C. 174,¹ to the effect that having regard to the interest which the firm of Tricumji Jivandas had in the business, which was very small, sale of the entire business should not be ordered without giving in the first instance an option to the appellants to purchase that share. Their Lordships are unable to accept this argument as they are satisfied that the decree in question is quite in conformity

1. (1876) 1 A. C. 174, *Syers v. Syres*.

with the provisions of the Indian Civil Procedure Code, and it does not appear that any application was made by the appellants to the Courts in India to mould the decree in the manner now suggested by them.

Their Lordships will now proceed to consider the important question whether the suit as framed is maintainable. It was argued by Mr. Rewcastle that in law there was no warranty for putting the name of the firm of Tricumji Jivandas as plaintiff in the suit at all, that the suit should have been instituted in the names of the individual members of the firm who existed at the time of the suit, and as this was not done the suit was not maintainable. The High Court met this argument by saying that O. 30, R. 1, Civil P. C., is wide enough to allow a firm, the members of which have collectively become the members of another firm to sue in the name of the firm of which they are members, that assuming that there was defect in the frame of the suit, no objection was taken in the trial Court, that the names of the members of the firm instead of having been given in the heading of the plaint are mentioned in the body of the plaint, referring to para. 1 of the plaint which their Lordships have already quoted, that such being the case, the name of plaintiff 1 is the descriptive name of the members composing the firm and that for these reasons, the arguments advanced were untenable: see the judgment of Mahomed Noor J. Their Lordships find it difficult to accept this reasoning having regard to the facts of this case. Their Lordships have already mentioned the names of the members of the family of Tricumji Jivandas who were interested in the partnership at the time of the institution of the suit. Assuming that O. 30, R. 1 is applicable to the case, it was argued by the learned counsel that in view of the fact that of these, the two insolvents, Gopaldas Tricumji and Morarji retired after their adjudication; one in April 1930, and the other in March 1931, and that Mohun Singh being a minor was only admitted to the benefits of the partnership, the only effective member of the firm at the time of the institution of the suit (11th December 1931) was Anandji, and that he alone cannot constitute a firm for the purposes of the suit. It was also argued that Khemji died in 1930, that no one had been brought on record to represent his interests, and that Mohun Singh not having been made a partner cannot be represented by the "firm." It is also to be noticed—so ran the argument—that O. 30, R. 1 is not applicable to the case as the business was carried on outside British India, and that a partnership firm cannot therefore sue in the firm's name. Finally counsel argued

that Khemji's legal representative and Mohun Singh should be made parties to the suit in order that the appellants should obtain a complete discharge on the taking of accounts.

The arguments outlined above, appearing to their Lordships to be valid, they asked Sir Thomas Strangman, the learned counsel for the respondents, if he objected to Khemji's son being joined as a party as legal representative of his father, and also in his personal capacity. He replied that he had no objection to his being so made a party. Later on a few days after the conclusion of the arguments, the learned counsel asked leave to withdraw his assent, as he was apprehensive that if the accounts were re-opened, the appellants might urge that the share of $1\frac{1}{2}$ annas of the partners in the firm of Tricumji Jivandas should be reduced by $\frac{1}{4}$, i. e., the share of Khemji, on the ground that Khemji's representative had become a party when his claim was barred by limitation. He added that had the point been taken in the first Court, the representative could have been added well within the period. The withdrawal was objected to by Mr. Rewcastle.

Their Lordships do not think it is right to allow the learned counsel to withdraw his assent, but it may be said that the case seems to have proceeded on the footing that Khemji's interests were represented by his son and that if this aspect of the case had been put before the trial Court, the defect might probably have been cured in time. On the other hand, it must also be remembered that the appellants took from the very beginning the objection that the suit was not maintainable. The arguments of the learned counsel for the appellants cannot be ignored as merely technical as they touch the very foundation of the case and affect the validity of the suit itself. In the circumstances, without pausing to deal in detail with the arguments of the appellants' learned counsel their Lordships think that the right course for them to adopt for the full determination of the dispute between the parties will be to order that Mohun Singh who has now become a major should be joined as a party to the suit as the legal representative of his father and also in his personal capacity. They direct that he should be so made a party, as a co-plaintiff under O. 1, R. 10, sub-r. (1), Civil P. C. If this is done and the headline of the plaint is suitably amended by adding him as a co-plaintiff in his double capacity, along with the present members of the firm, it is not disputed that plaintiff 1 firm will be properly represented for carrying on the suit.

As a result of the above decision the decrees in the case will have to be set aside and as a necessary consequence, the case should be re-

tried after amending the plaint and the written statement if necessary; but their Lordships think it is desirable that they should point out that as between the present parties they have accepted in full, the conclusions of the Courts below on all the points barring the one relating to the maintainability of the suit which they have now corrected. As regards costs, the appellants will get their costs of this appeal but they will pay the costs already incurred by the respondents in the Courts below. Provision for the future costs will be made in the final decree which will be passed in the suit. Their Lordships direct that the case should be disposed of by the High Court to which it will be remanded as expeditiously as possible in the light of the above observations. They will humbly advise His Majesty accordingly.

R.K. *Case remanded.*
Solicitors for Appellants—*Hy. S. L. Polak & Co.*
Solicitors for Respondents —
Douglas Grant & Dold.

*** * A. I. R. (32) 1945 Privy Council 74**
(*From Allahabad*)

22nd November 1944

LORD RUSSELL OF KILLOWEN, LORD
GODDARD AND SIR MADHAVAN NAIR
Govind Ram and others — Appellants
v.

Madan Gopal and others — Respondents.

Privy Council Appeal No. 40 of 1943; Allahabad
Appeal No. 32 of 1938.

* * Registration Act (1908), S. 17 (2)—Com-
position deed—Registration required under S. 5,
Trusts Act — If unregistered it has no effect :
28 Bom. 364 and 38 Bom. 576=(14) 1 A. I. R.
1914 Bom. 55=24 I. C. 730, **OVERRULED**.

No doubt cl. (2) of S. 17 distinctly provides that nothing in cl. (b) applies to any composition deed; but this does not mean that if a document requires registration under any other enactment, e. g., Trusts Act S. 5, the exemption contained in cl. (2) would prevail against that other enactment. What the Registration Act provides is that a composition deed so far as it purports or operates to create, declare, assign, limit or extinguish . . . any right, title or interest . . . of the value of Rs. 100 and upwards to or in immovable property will not require registration; but it does not say that any composition deed if it purports to do or operates to do anything else will not require registration either. Hence a composition deed required to be registered under S. 5, Trusts Act, but not registered, does not have effect : 28 Bom. 364 and 38 Bom. 576=(14) 1 A. I. R. 1914 Bom. 55=24 I. C. 730, **OVERRULED**; (21) 8 A. I. R. 1921 Mad. 337 (F. B.) and (28) 15 A. I. R. 1928 All. 726 (F. B.), *Ref.* [P 77 C 1,2]

Sir Thomas Strangman & S. P. Khambatta —
for Appellants.

C. S. Rewcastle and R. Ritson — for Respondents.

Lord Russell of Killowen. — The point for decision on this appeal from the High Court at Allahabad is short, but not free from difficulty. The relevant facts which gave

rise to it must first be stated. One Seth Kashi Nath obtained a decree (in a Suit No. 42 of 1930) against the present respondents 2, 3 and 6, and one Lala Sagarmal. Lala Sagarmal is dead, and his sons the present respondents 4 and 5 were substituted for him on the record in the present suit. Respondent 6 has been declared insolvent and the Official Receiver, Aligarh, has also been brought on the record in the present suit. For convenience the original defendants to Suit No. 42 of 1930 or those representing their interests from time to time will all be included in the words "the debtors." Seth Kashi Nath having obtained his decree applied to attach certain immovable property as being the property of the debtors and liable to be sold in execution of the decree. He was met by an objection filed on behalf of the present appellants claiming the property as trustees under a deed of 25th May 1929. The objection was allowed. Thereupon Seth Kashi Nath commenced the suit in which this appeal arises, claiming a declaration that the property was liable to be attached and sold in satisfaction of his decree. To that suit he joined the present appellants as co-defendants with the debtors. By his plaint he alleged that the said deed was a collusive and fraudulent document. He also alleged that it had not been registered. By their written statement the appellants alleged that there was no necessity for the deed being registered, and that the plaintiff's allegation as to want of registration had no effect.

The deed in question was a composition deed by which the debtors conveyed, assigned and transferred to the appellants (therein called the trustees) (1) the lands, hereditaments and premises described in Sch. 1 thereto, (2) the shares and other personal properties the particulars whereof were contained in Sch. 2 thereto, and (3) all other the property of the debtors and each of them except the property described in Sch. 3 thereto, upon trust for sale and conversion, the proceeds to be divided among the "creditors" (as therein defined) of the debtors as therein provided, and the surplus (if any) to be paid to the debtors. The deed contains powers and provisions commonly found in a composition deed which creates a trust of property for the benefit of creditors. The point at issue can now be stated—it is whether by reason of S. 17, Registration Act, 1908, the deed of 25th May 1929 (hereinafter called the said deed), was exempt from any requirement to be registered, notwithstanding that S. 5, Trusts Act, 1882, enacts that no trust in relation to immovable property is valid unless registered. The trial Judge decreed the suit, holding that the said deed was a collusive document, and

was not binding on Seth Kashi Nath. The appellants appealed to the High Court. Pending the hearing of the appeal Seth Kashi Nath died. His son (the present respondent 1) was substituted for his father on the record.

The High Court held that the said deed, not having been registered in accordance with S. 5, Trusts Act, 1882, was invalid. The appellants however had applied to be allowed to amend their written statement, and to plead that the defect due to non-registration had been cured by the registration of a document dated 6th June 1929, and the High Court made an order on 26th September 1935, (1) setting aside the decree of the Court below, and (2) remanding the case to that Court to dispose of it after hearing argument and any relevant evidence as to the effect of the registered document of 6th June 1929. The case was then heard before the Civil Judge, who held that the registered deed did not cure the defect. He accordingly, by decree dated 14th December 1936, declared that the immovable properties in suit and specified in the plaint were liable to be sold in satisfaction of the decree in Suit No. 42 of 1930. The appeal by the present appellants from this decree was dismissed by decree of the High Court of 9th November 1938. It is from this decree that the present appeal has been brought. It is convenient at this stage to state that no point now arises in regard to the alleged curative effect of the document of 6th June 1929. The argument was not pressed before the Board by counsel for the appellants, and very properly, for in their Lordships' opinion there is nothing in it. Their Lordships now proceed to consider in detail the relevant enactments. The Registration Act, 1908, is an Act consolidating the law contained in previous Acts and repealing those Acts. Its most important section in connection with the present appeal is S. 17, the relevant provisions of which run thus:

17. (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which Act 16 of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:

- (a)
- (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;
- (c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and
- (d)

(2) Nothing in cls. (b) and (c) of sub-s. (1) applies to—

(i) any composition deed; or

It will be observed that there is not, in terms, any direct provision enacting that no composition deed need be registered, or that no composition deed may be registered. There is in terms only a provision that nothing in cls. (b) and (c) of sub-s. (1) applies to any composition deed. These words are, their Lordships think, open to two constructions, viz., they might be construed as meaning (A) that all composition deeds are exempt from any requirement to be registered, or they might be construed as meaning (B) that all composition deeds are exempt from the requirement to be registered imposed by that Act: in other words that a composition deed is not required to be registered because it purports or operates to do any of the things enumerated in (b) or because it acknowledges the receipt or payment of a consideration on account of the matters enumerated in (c). Construction A would, in the case of composition deeds declaring trusts of immovable property, clash with S. 5, Trusts Act, 1882; construction B would not. Section 5, Trusts Act, is in the following terms:

"5. No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee. No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud."

Their Lordships prefer the construction which involves no clash with S. 5, Trusts Act, 1882, and they are strengthened in this view by the following considerations. When the Trusts Act, 1882, came into force, the Registration Act then in existence was the Act of 1877 which contained (in S. 17) similar provisions to those in S. 17 of the present Act. Notwithstanding the fact that composition deeds very commonly involve the declaration of a trust of immovable property, it was deemed necessary or advisable to enact that no trust in relation to immovable property should be valid unless registered. Registration thus was made essential to the validity of every such trust notwithstanding the existence of the old S. 17. Nor can the subsequent enactment of the Registration Act, 1908, be said to have affected the position as it existed under the Trusts Act, 1882, for the Act of 1908 is a Consolidation Act and contains a section (S. 93) which provides:

"(1) The enactments mentioned in the schedule are repealed to the extent specified in col. 4 thereof.

(2) Nothing herein contained shall be deemed to affect any provision of any enactment in force in any part of British India and not hereby expressly repealed."

The late Sir Dinsha Mulla in his work which deals with the Registration Act, 1908 (2nd Edn., p. 309), remarks in reference to this section:

"The principal enactments referred to are the Transfer of Property Act, Ss. 54 and 59, abolishing optional registration in the case of sales and mortgages, the Bengal Tenancy Act, and, other enactments containing special provisions relating to the registration of certain documents."

It was urged on behalf of the appellants that by virtue of the definition clause in the Trusts Act, 1882, the word "registered," in S. 5, meant registered under the registration law for the time being in force, and that since the Registration Act now in force did exempt composition deeds from registration, the requirement of registration in S. 5, Trusts Act, 1882, could not apply to the deed in question. This contention is based on construction A, which their Lordships have rejected; but in any event their Lordships think that the words in the definition clause refer only to the method and procedure of effecting the registration which is required by S. 5.

A further argument was adduced on behalf of the appellants to the following effect. The Transfer of Property Act by Ss. 54, 59 and 107 required the registration of certain documents of sale, mortgage and lease, respectively which by reason of the small value involved would not have required to be registered under the Registration Act, 1908. Section 4 provided that those sections were to be read as supplemental to the Registration Act. The question arose whether S. 4 operated to apply to documents which were covered by Ss. 54, 59 and 107, but which had not been registered, the sanctions which S. 49, Registration Act, 1908, applied to documents which were covered by that Act but which had not been registered. As a result of two Full Bench decisions, 44 Mad. 55¹ and 50 ALL. 986,² which decided that S. 4 had not that operation, S. 49, Registration Act, was amended so as to make unregistered documents which should have been registered under the Transfer of Property Act, subject to the sanctions enacted in S. 17, Registration Act. It was pointed out that no similar amendment had been made in regard to the documents required to be registered by S. 5, Trusts Act. From this it was argued that composition deeds were not required to be registered even though trusts of immovable property were declared thereby, for if this were not so one would have

1. ('21) 8 A. I. R. 1921 Mad. 337 : 44 Mad. 55 : 59 I. C. 350 (F. B.), Rama Sahu v. Gowro Ratho.

2. ('28) 15 A. I. R. 1928 All. 726 : 50 All. 986 : 118 I. C. 177 (F. B.), Sohanlal v. Mohan Lal.

expected (so ran the argument) that the necessary amendment would have been made. Their Lordships, however, do not consider the cases are really similar. The sections of the Transfer of Property Act added to the number of documents which had to be registered, documents of the same kind as those included in the Registration Act but excluded from its operation only by reason of their smaller value. It was a matter of course that non-registration of them should entail the same sanctions as those prescribed by S. 17, Registration Act, in the case of similar unregistered documents of a higher value. When it was decided by the Full Bench decisions in Madras and Allahabad that S. 4, T. P. Act, had not brought about the result, the necessary amending legislation was passed. The position in regard to S. 5, Trusts Act, was entirely different. It dealt with the registration of documents of a class which were not included in the classes of documents required to be registered by the Registration Act, although it is a class wide enough to include some forms of the documents referred to in S. 17 (2) (i), Registration Act. Section 5, Trusts Act, provides its own sanction for non-registration, viz., invalidity.

Counsel for the appellants relied also on two decisions in the High Court of Bombay which decided the exact point in favour of the appellants' contention. The first decision was pronounced in 1904 in 28 Bom. 364,³ the second was pronounced in 38 Bom. 576.⁴ The Court in the latter case merely followed the decision in the former one. The reasons given for the judgment in the first case appear to their Lordships unconvincing, and in some respects manifestly incorrect. The judgment is based upon the view indicated more than once, that the real ownership of the property conveyed by a debtor to the trustees of a composition deed remains in the debtor, and that the element of a trust in a composition deed is a mere accident and not of the essence of the matter. The true position would appear to be quite otherwise. The debtor ceases to have any interest in the property conveyed to the trustee; he is only interested in the surplus proceeds, if any result. The trust, so far from being a mere accident, is the essential machinery for producing the means of paying off the creditors. The reasoning upon which the decision is based is erroneous, and for the reasons already indicated their Lordships are of opinion that the Court ought to have reached the opposite conclusion.

It was, however, urged that decisions of such long standing should not be departed

from. No doubt an appellate tribunal does not lightly interfere with decisions of long standing, especially in cases where their reversal might jeopardise existing titles acquired on the faith of their correctness. Their Lordships, however, while assenting to this view in general, feel that this danger does not exist to any serious degree in the case of composition deeds. Composition deeds work themselves out and come to an end; and the cases in which any one could be in a position to claim the immovable property comprised in an unregistered composition deed adversely to the debtor and the trustees can only be of very rare occurrence. In these circumstances their Lordships feel justified in overruling these decisions, the reasons for which they consider to be obviously wrong.

Their Lordships agree with the judgment of the High Court in the present case and with the construction of sub-s. 2 (1) of S. 17, Registration Act, stated by them in the following passage :

"It is true that cl. (2) of S. 17 . . . distinctly provides that nothing in cl. (b) (and it is only under cl. (b) that the document might require registration) applies to any composition deed ; but this does not mean that if a document requires registration under any other enactment, the exemption contained in cl. (2) would prevail against that other enactment. What the Registration Act provides is that a composition deed so far as it purports or operates to create, declare, assign, limit or extinguish . . . any right, title or interest . . . of the value of Rs. 100 and upwards to or in immovable property will not require registration ; but it does not say that any composition deed if it purports to do or operates to do anything else will not require registration either."

For the reasons indicated in this judgment their Lordships are of opinion, and they will humbly advise His Majesty, that this appeal should be dismissed. The appellants will pay the costs of the appeal to respondent 1, who alone appeared.

R.K. *Appeal dismissed.*
Solicitors for Appellants — T. L. Wilson & Co.
Solicitors for Respondents —
Douglas Grant & Dold.

A. I. R. (32) 1945 Privy Council 77
(From Madras : ('42) 29 A. I. R. 1942
Mad. 156)

13th November 1944

LORD RUSSELL OF KILLOWEN, LORD
GODDARD AND SIR MADHAVAN NAIR
M. Ethirajulu Naidu — Appellant

v.
A. Ranganatham Chetti and others
— Respondents.

Privy Council Appeal No. 21 of 1944.

Lessor and Lessee — Lessees to construct building on land demised — Lessor to resume possession only on payment of market value of building — Question of surrender of possession

3. ('04) 28 Bom. 364, Maluk Chand v. Mani Lal.

4. ('14) 1 A. I. R. 1914 Bom. 55: 38 Bom. 576 : 24 I. C. 730, Chandra Shankar v. Bai Magan.

held did not depend upon whether offer by lessor as to price of building ought or ought not to have been accepted by lessee : ('42) 29 A.I.R. 1942 Mad. 156, *REVERSED* — Lessees held entitled to remain in possession as tenants until market price was paid or tendered.

Under the lease for 10 years executed on 1st October 1922 the lessees constructed a cinema hall on the land demised. The material clause of the lease was as follows : "The lessee shall always and in any event be entitled to be paid the price of the superstructure built on the said plot of land before he surrenders possession of the land either on the expiry of the lease hereby granted or any other future lease or at any time. The price shall be fixed according to the market value of the buildings as at the time of ascertainment and payment." On 9th October 1932 the lessor demanded possession of the property and offered Rs. 3000 as the true market value. This offer was refused by the lessee who alleged the market price to be 1 lac. In the suit by the lessor for possession and mesne profits the lessor contended that the clause in question gave the lessees only a possessory lien as security for payment of the purchase price, and that as the lessees had remained in possession as though they were still lessees and had indeed granted a sub-lease they had acted inconsistently with their lien and must be regarded as trespassers and held accountable for mesne profits. The lessees on the other hand contended that they were entitled to hold over as tenants by virtue of the clause at the rent reserved by the lease until they were paid the present market price :

Held that (1) the question of surrender of possession did not depend on whether the offer by the lessor as to the market price of the building was ridiculously low or approximated to true value of building and ought or ought not to have been accepted unless perhaps the exact amount which was found to be the present market value had been offered : ('42) 29 A. I. R. 1942 Mad. 156, *REVERSED*. [P 79 C 1]

(2) the clause contemplated that the price was to be fixed, which must mean by agreement or by valuation, and it could have been so fixed before the expiration of the term. The lessees were entitled to be paid the present market price, no less and no more, and until that price was paid or at least tendered they were entitled to remain in possession and enjoyment of the property as tenants at the rent reserved by the lease and could not be treated as trespassers liable to account for mesne profits. [P 79 C 1]

W. W. K. Page — for Appellant.
Respondents ex parte.

Lord Goddard. — This is an appeal by special leave from a judgment of the High Court at Madras in its civil appellate jurisdiction affirming with modifications a judgment of that Court in its ordinary civil jurisdiction in an action in which the appellant claimed possession of certain land and the superstructure thereon and mesne profits. The case depends entirely on the true construction of cl. 4 of a lease dated 1st February 1923, made between the appellant and the predecessor in title of the respondents. The facts, which can be succinctly stated, are that on 18th October 1912, the appellant and his brother granted a lease to the father of the respondents of a plot of land in the City of Madras for a term of 10 years from 1st October 1912, at a rent of

Rs. 50 per mensem, the tenant to be at liberty to erect a building on the land demised. The tenant built a theatre on the land, and shortly before the lease expired the appellant, who had become the sole owner of the land, agreed to grant a new lease to the lessee. Accordingly on 1st February 1923, a new lease for 10 years from 1st October 1922, at a rent of Rs. 100 per mensem was executed. The clause material in this action was in these terms :

The lessee shall always and in any event be entitled to be paid the price of the superstructure built on the said plot of land before he surrenders possession of the land either on the expiry of the lease hereby granted or any other future lease or at any time. The price shall be fixed according to the market value of the buildings as at the time of ascertainment and payment.

On 9th October 1932, the appellant's wakil demanded possession of the property and offered the sum of Rs. 3,000 as representing the true market value. This offer was refused by the respondents, who had become entitled to the lease on the death of their father, and who contended, first that under the provisions of the City Tenants' Protection Act, which was passed before the execution of the lease, they were entitled to buy the property and that if not entitled to the benefit of that Act they were entitled to remain in possession by virtue of the aforementioned clause until they were paid the present market price which they alleged was rupees one lac. The first contention of the respondents has been disposed of by a decision* of the Board adversely to them and it is unnecessary to refer to it further. As to the second, the appellant contends that the clause in question gives the respondents only a possessory lien as security for payment of the purchase price, and that as the respondents have remained in possession as though they were still lessees and have indeed granted a sub-lease they have acted inconsistently with their lien and must be regarded as trespassers and held accountable for mesne profits. The respondents on the other hand contended in the Courts below that they were entitled to hold over as tenants by virtue of the clause at the rent reserved by the lease until they were paid the present market price. On the true construction of the clause their Lordships are of opinion that the respondents' contention was clearly right. Until they are paid they cannot be required to surrender possession, and are therefore entitled to remain in possession, and if they remain they stay there as tenants on the same terms as were contained in the lease. Their Lordships do not doubt that the meaning of the clause is that the respondents could hold over till they were

* See ('40) 27 A. I. R. 1940 P. C. 17.

paid. In their opinion therefore the judgments in both Courts below were right in the result, but as they are not in agreement with some of the reasons given they will briefly refer to them. The case was first heard by Wadsworth J. On the question whether the respondents were wrongfully in possession of the property he held that it depended on whether or not the sum offered by the appellant was "ridiculously low" or whether it approximated to the true value of the superstructure and accordingly referred the action to an Official Referee to ascertain the value. On the reference the Referee found on the basis which was subsequently held to be correct that the value was Rs. 18,000, six times what had been offered and about a sixth of what had been asked. On the matter coming up for further consideration before Venkataramana Rao J. on further consideration, while he expressed agreement with Wadsworth J. he went on to hold that this was not a case of lien but that the lessees could enjoy the property till the amount was paid and that they could not be treated as trespassers liable to account for mesne profits. On appeal to the appellate jurisdiction of the High Court, Sir Lionel Leach C. J. and Horwill J. took the same view as did Wadsworth J., that the respondents were not bound to accept an offer which was ridiculously inadequate. In their Lordships' opinion the case does not depend on whether an offer ought or ought not to have been accepted, unless perhaps the exact amount which was found to be the present market value had been offered. The clause contemplates that the price is to be fixed, which must mean by agreement or by valuation, and it could have been so fixed before the expiration of the term. The respondents were entitled to be paid the present market price, no less and no more, and until that price was paid or at least tendered they were entitled to remain in possession and enjoyment of the property. Their Lordships will humbly advise His Majesty that the appeal should be dismissed.

G. N. *Appeal dismissed.*
Solicitors for Appellant — *Lambert & White.*
Respondents *ex parte.*

A. I. R. (32) 1945 Privy Council 79
(*From Allahabad*)

6th November 1944

LORD RUSSELL OF KILLOWEN, LORD
GODDARD AND SIR MADHAVAN NAIR
Radha Krishen — Appellant

v.

Sri Krishen and others — Respondents.

Privy Council Appeal No. 43 of 1942 ; Allahabad
Appeal No. 18 of 1939.

(a) Hindu law — Adoption — Evidence as to fact of adoption — Value of — Assessment of.

Credibility in the witness box is more valuable in assessing evidential value of the testimony of witnesses on the fact of adoption than kinship or "standing."
[P 80 C 1]

(b) Hindu law—Adoption—Fact of—Disputes between widow and reversioner — Fact that no mention was made of son adopted by widow's husband does not necessarily show that no adoption was made.

The fact that in the disputes between the widow and the reversioners of the widow's husband relating to the property of the widow's husband no mention was made by either party of the existence of a son adopted by the widow's husband does not necessarily show that no adoption was made by the widow's husband.
[P 80 C 2]

Sir Thomas Strangman and J. M. Pringle —
for Appellant.

C. S. Rewcastle and S. P. Khambatta —
for Respondents.

Lord Russell of Killowen. — The suit which gave rise to this appeal was brought by Radha Krishen (hereinafter called the appellant) for a declaration that he was the adopted son of one Shankar Lal deceased and for delivery of possession of the property of Shankar Lal specified and described in the schedules to the plaint. Shankar Lal (who had no issue of his own) was the great-uncle of the appellant, who was a grandson of Shankar Lal's only brother Debi Sahai. Debi Sahai had two sons Hari Krishen and Sri Krishen. The appellant was the natural son of Hari Krishen, who had also two other natural sons by a wife whom he married after the death of the appellant's mother. The defendants to the suit were (1) Ganga Dei, the widow of Shankar Lal, (2) Sri Krishen and (3) and (4) the two other natural sons of Hari Krishen. Hari Krishen died in the year 1931. While the main issue in the suit was whether the appellant had been adopted by Shankar Lal, the decisive question in the case was, in their Lordships' opinion, whether a document dated 19th October 1924, and purporting to be a holograph will executed by Shankar Lal, and witnessed by four witnesses, is a genuine document or (as alleged by the respondent Sri Krishen) a forgery. The Subordinate Judge decreed the suit. He accepted the evidence given by and on behalf of the appellant, and held the document to be genuine and the adoption proved. The High Court rejected the evidence of the appellant's witnesses, and held that "no will was in fact executed by Shankar Lal in 1924" (i. e., that the document was a forgery) and that the adoption had not been proved. The suit was accordingly dismissed. The appellant has appealed to His Majesty in Council. Ganga Dei died pending the appeal.

There is no dispute that Shankar Lal had great affection for the appellant. He was in fact born in Shankar Lal's house in March 1917, and after the death of the appellant's mother in the year 1919 he was brought up and cared for by Shankar Lal and his wife Ganga Dei, the child's father having remarried. Further, it is common ground that Shankar Lal arranged the appellant's ear-boring ceremony in the year 1924, which was celebrated by a feast given by Shankar Lal in his own house. It is also common ground that on Shankar Lal's death in the month of January 1932, his obsequies were performed by the appellant. Affirmative evidence of the fact of adoption by four witnesses, who said they were present at the ceremony, and whose evidence was unshaken in cross-examination, was accepted as reliable by the trial Judge. One of them identified a document as being in the handwriting of one Bagwati Prasad, who was a clerk in the employ of Shankar Lal. It was a list of persons to be invited to Shankar Lal's residence for 18th March 1924, "on the occasion of the adoption and ear-boring ceremonies of Radha Krishen." This list is in some cases signed by the guests invited, presumably to acknowledge receipt of the invitation conveyed to them orally. The trial Judge, in relying on this list, erroneously referred to it as being in the handwriting of Shankar Lal; but this error in no way affects its value as evidence, because it must obviously have been prepared by the clerk under the direction of Shankar Lal.

The High Court dismissed all this evidence (including the solemn fact that the appellant performed the obsequies) on two grounds, neither of which appears to their Lordships a justification for differing from the view adopted by the trial Judge, who had the overriding advantage of seeing the witnesses and observing their demeanour in chief and under cross examination. They commented on the fact that no person who was a member of the family, or whose name was on the list or who was "a person of standing" was called by the appellant. This criticism appears of small weight in view of the fact that the witnesses who did testify to their presence at the ceremony of adoption were unshaken in cross-examination, and were accepted by the trial Judge as credible witnesses. Credibility in the witness-box is more valuable in assessing evidential values than kinship or "standing."

The second ground relied on by the High Court needs some preliminary explanation. When Shankar Lal died in the month of January 1932, the appellant was a boy of 14. No will of Shankar Lal was forthcoming. Upon the footing of Shankar Lal having died

intestate and without issue, the persons interested in his estate would be Ganga Dei as a Hindu widow, and Debi Sahai as nearest reversioner. In between the death of Shankar Lal and the institution of the present suit, sundry differences arose between Ganga Dei and Debi Sahai in relation to the property of Shankar Lal. One example will suffice for the purpose of explaining the second ground upon which the High Court felt justified in rejecting the affirmative evidence of the appellant's adoption. On 8th March 1932, Ganga Dei applied to the District Judge for a succession certificate, alleging in her petition that as a Hindu widow she was the owner in possession of Shankar Lal's estate. To this application Debi Sahai lodged an objection, claiming to be the nearest reversioner and alleging that the widow had only a life interest, but no right in the corpus of the estate. The High Court rely upon the fact that in this proceeding (and in other matters of dispute, in relation to Shankar Lal's property between Ganga Dei, claiming the rights of a Hindu widow, and Debi Sahai claiming to be nearest reversioner) no mention is made by either of them of the appellant being the adopted son of Shankar Lal. Their Lordships are unable to appreciate how this fact really assists the view that no adoption was made. It is not necessarily inconsistent with adoption having taken place. The disclosure of the existence of an adopted son of Shankar Lal would at once have put an end to the claims which each was asserting, a fact which, if an adoption had taken place, would account for the absence of any reference thereto. It is, however, to be observed that in the course of some arbitration proceedings between them, Debi Sahai, in his objections, did allege that in or about the year 1924 Shankar Lal adopted the appellant and performed the ceremonies relating to adoption with the permission of the appellant's father.

The witnesses on behalf of Sri Krishen consisted of himself and four persons who were not members of the family. Sri Krishen denied the adoption; he also denied, what is now admitted, that the appellant lived with and was brought up by Shankar Lal. The evidence of the other four witnesses was merely negative as to the adoption. They too denied that the appellant lived with Shankar Lal. The only other witness called by Sri Krishen produced a document to which little or no attention was paid by either Court, but upon which reliance was placed at the hearing before their Lordships' Board. It is a form of application for the admission of the appellant to a school. It is dated 13th July 1929, and is signed by Debi Sahai, and filled in by him. In it the appellant's father is stated to be Hari Krishna. To

that extent it is inconsistent with adoption, but no one knows the circumstances in which Debi Sahai came to fill in and sign the form. It is incorrect in other respects, for according to its tenor Debi Sahai was the guardian of the boy, which he was not. But for what it is worth (an estimate which must remain doubtful) it is in favour of Sri Krishen.

Their Lordships having considered the relevant evidence, apart from the document of 19th October 1924, are of opinion that even upon that evidence it is difficult to see how the High Court were justified in rejecting the affirmative evidence of adoption given by the appellant's witnesses, in spite of its acceptance as truthful by the trial Judge.

They now proceed to consider the document in question. It purports to be a holograph will of Shankar Lal. It consists of a preliminary statement and seven paragraphs, and contains the following passage:

According to the desire of my father and mother and with the consent of my own brother's son, Babu Hari Krishn, Vakil for whom I, the executant, have great affection from his childhood. I, having performed the religious ceremonies relating to kanchhedan (ear-boring), and given a feast according to the custom prevailing in the community and Hindu law, have adopted my grandson, Radha Krishna, son of Babu Hari Krishn, Vakil, Vaish Agarwal by caste, resident of Meerut, whom I have reared like my own son for five years, in order to make him my successor executed a deed-of-adoption also in his favour and made him, like myself the owner in possession of and heir to my entire house and field property as well as money in cash and house-hold goods in addition to the house and field property of my wife but as my adopted son is still a minor, I, while in a sound state of my body and mind, without any compulsion or coercion on the part of any one, of my own accord and free will and as a precautionary measure give the following instructions. After my death, my estate shall continue to be managed according to the terms laid down in this will and nothing shall be done contrary thereto.

It ends with these words — "Written on the 19th Oct. 1924, by the pen of Shanker Lal in autograph." It purports to be signed by Shanker Lal at the foot, and, in the margin, and to be witnessed by four witnesses, viz., Debi Sahai, Hari Krishen, Bhagwati Prasad and one Lekram. The document, according to the appellant, was found by him in the month of August 1935 among some papers of Ganga Dei. Having found it he, after service of a notice on Sri Krishen, commenced this suit. Sri Krishen asserts that the document is a forgery. Ganga Dei by her written statement admitted the adoption, but alleged it was made subject to an agreement in her favour, which the trial Judge found had never been made. If the document is not a forgery, but the genuine will of Shanker Lal, the case against the appellant would, in their Lordships'

opinion, be unarguable; and they now proceed to consider the evidence in relation thereto.

The evidence is that of witnesses familiar with the handwritings of the persons concerned, and of an expert in handwriting. Abdul Shakur was a clerk in the employ of Hari Krishen from 1921 to 1925. At the time of the trial, he was the clerk of another gentleman. He was a disinterested witness. He testified to the following facts that Shanker Lal made a will a few months after the adoption, that he was present at the time; that he and Shankar Lal prepared the draft of the will; that Shankar Lal himself "scribed" the will to the best of his knowledge and signed it in his presence; that it was attested by Hari Krishen, Debi Sahai and others; that the will was the document in question. He also verified the signatures of Debi Sahai and Hari Krishen and stated that the witnesses attested the will in the presence of Shankar Lal. He was not cross-examined on any of these statements. The trial Judge accepted him as a witness of truth. In these circumstances the evidence of this witness alone would establish the genuineness of the document. But in addition to his testimony the evidence of competent witnesses identified the signatures of three of the attesting witnesses. The fourth, Lekram, could not be traced.

Mr. Walters, the handwriting expert, was a very careful and thorough witness. He had compared enlarged specimens of admitted signatures with enlarged specimens of the disputed signatures. In his opinion the will is genuine, and he gives his reasons in a long and elaborate report which he states to be, to the best of his knowledge, correct. This evidence, even if treated merely as corroborating the other witnesses, is of great value; but it received but scant consideration at the hands of the High Court. It was brushed aside apparently because of a passage quoted from the evidence which must (their Lordships think) have been misinterpreted by the High Court, for their Lordships can find nothing in it to cast a shadow of doubt upon the competence or reliability of Mr. Walters.

Their Lordships are of opinion, after a careful consideration of all the evidence upon the point, that the trial Judge came to a right conclusion in accepting the will as a genuine document, and that the High Court were not justified on the evidence in reversing that finding of fact. One small matter of detail should be mentioned. The will refers to the execution of a deed of adoption. No such deed was necessary, but no such deed has been produced or found. The suggested explanation of its non-appearance is the manner of Shankar Lal's death. He was murdered by dacoits, who looted his house and destroyed a number of

documents. This explanation was accepted by the trial Judge as a probable one, and their Lordships agree with this view. No reference to the matter was made in the judgment of the High Court. For the reasons which they have indicated their Lordships are of opinion that this appeal should be allowed, the decree of the High Court set aside and the decree of the Subordinate Judge restored. They will humbly advise His Majesty accordingly. The respondents must pay the costs in the High Court and of this appeal.

G.N.

Appeal allowed.

Solicitors for Appellant — *Hy. S. L. Polak & Co.*
Solicitors for Respondents — *T. L. Wilson & Co.*

A. I. R. (32) 1945 Privy Council 82*(From Madras)*

20th November 1944

LORD THANKERTON, LORD WRIGHT
AND SIR JOHN BEAUMONT

*Rajammal alias Sundarammal and
others — Appellants*

v.

*Sabapathi Pillai and another —
Respondents.*

Privy Council Appeal No. 45 of 1943.

Transfer of Property Act (1882), S. 3—Attestation—It does not fix knowledge on witness.

Mere attestation is not enough to involve the witnesses with knowledge of the contents of the deed. This is equally true of the witnesses, who identify the executant before the Registrar. [P 83 C 1]

J. M. Pringle — for Appellants.*R. Ritson* — for Respondents.

Lord Thankerton. — This is an appeal by special leave from the judgment and decree of the High Court of Judicature at Madras, dated 7th November 1941, which reversed the appellate judgment and decree of the Subordinate Judge of Salem, dated 21st November 1938 (which had affirmed the judgment and decree of the District Munsif of Sankaridrug at Salem), and decreed the respondents' suit to recover immovable property forming part of the estate of one Annusami Pillai. Annusami Pillai died in 1894 without issue, leaving him surviving two widows, namely, the senior, Akilandammal, who died in 1899, and the junior, Sundarammal, who died in April 1934. The present suit was filed by Subbaraya Pillai, as nearest reversioner of Annusami, at the time of Sundarammal's death, against the present appellants, who claimed to retain possession of the properties under a registered deed of gift dated 25th December 1899, executed a few days after the death of Akiland-

ammal by Sundarammal in favour of her elder brother, Kumaraswami Pillai, whose rights as donee are now vested in the present appellants. It is not in dispute that after the death of Annusami the two widows had a partition effected through mediators of the bulk of his property and that each of them took separate possession of the shares respectively assigned to them. Further, Akilandammal then made a gift of her share to the plaintiff, who was second nearest reversioner at that time, his paternal uncle, Arumugam, being the nearest one, and the plaintiff thereafter enjoyed possession of Akilandammal's share. Apart from the deductions, if any, which can be derived from the statements and terms of the deed of gift of 25th December 1899, there is no evidence from which the terms of the arrangement between the widows or the terms of the gift by Akilandammal to the plaintiff can now be ascertained, and, therefore, no evidence to show that the widows attempted to interfere with the reversionary interest in Annusami's estate.

Coming to the deed of gift, 1899, it clearly states that the arrangement effected between the widows was on the footing that each should enjoy their respective shares of the estate, being competent to effect gift and sale, and that Akilandammal gave her share absolutely to the plaintiff, it further made clear that the gift thereby made was an absolute one. There were eight attesting witnesses—no unusual number in India—of whom Arumugam was one and the plaintiff was another. The plaintiff further identified the executant, Sundarammal, before the Sub-Registrar. It may be mentioned that counsel for the appellants agreed that the agreement in 1921 between the plaintiff and appellant 1 for the partition of small undivided portions of the estate was not of assistance in the present question. The learned Munsif held, on the evidence before him, that no question of estoppel by conduct arose to prevent the plaintiff from challenging Sundarammal's gift, but he held that the plaintiff had enjoyed a distinct benefit by the transaction and that the doctrine of election operated to prevent him from resiling from the position which he had previously accepted. On appeal, the Subordinate Judge affirmed the judgment of the Munsif, placing his decision mainly on the same ground, i.e., that the plaintiff had derived a substantial interest under the deed of gift under challenge, and was not now entitled to repudiate it. But the learned Judge also stated that there could be very little doubt that the plaintiff and Arumugam, the only reversioners then in existence, had consented to the gift made by Sundarammal and their

consent must be sufficient to make the gift binding on them. Their Lordships may say at once that they are unable to discover any evidence of consent, apart from the point as to election, and counsel for the appellants was unable to indicate any such evidence.

On second appeal, the High Court held that there was not evidence from which the lower Courts could legitimately draw the inference that the plaintiff had knowledge of the contents of Sundarammal's deed of gift. Counsel for the appellants rightly conceded that that was a question of law, the determination of which fell within the province of the High Court on second appeal. Their Lordships are of opinion that the decision of the High Court was correct. It is settled that mere attestation is not enough to involve the witnesses with knowledge of the contents of the deed, and this is equally true of the witnesses who identify the executant before the Registrar. While their Lordships' view renders it unnecessary to decide it, their Lordships incline to the view that the language of the deed was so clear as to bring home its meaning and effect to the plaintiff, if he knew the contents, but their Lordships are unable to find any circumstances existing at the time, which could be held to have affixed him with such knowledge. The circumstance that counsel mainly relied on was that, on Akilandammal's death, Sundarammal became entitled, by survivorship, to the whole estate, and that the plaintiff could not have resisted a claim by her for the half of which he was then in possession under Akilandammal's gift, of which he had no written evidence, and that he may be held to have arranged with Sundarammal that she should recognise Akilandammal's gift to him as an absolute one, and he should recognise Sundarammal's right to make an absolute gift:—that is the finding of the learned Subordinate Judge, which he described as involving a substantial benefit to the plaintiff. But their Lordships are unable to find any evidence from which such an arrangement can be inferred. The evidence, including the non-disturbance by Sundarammal of the plaintiff's enjoyment of Akilandammal's gift, is equally consistent with an arrangement between the widows which affected their right of survivorship, but did not affect the rights of the reversioners, and the statements in Sundarammal's deed of gift cannot be used against the plaintiff unless and until he is proved to have had knowledge of them, and, above all, they cannot prove that he had knowledge of them.

Accordingly, their Lordships are of the opinion that the appeal should fail, and they will humbly advise His Majesty that the appeal should be dismissed, and that the judg-

ment and decree of the High Court should be affirmed. The appellants will pay the respondents' costs of the appeal.

R.K. *Appeal dismissed.*

Solicitors for Appellants — *Lambert & White.*

Solicitors for Respondents — *Hy. S. L. Polak & Co.*

A. I. R. (32) 1945 Privy Council 83

(*From Ceylon*)

20th December 1944

LORDS RUSSELL OF KILLOWEN, WRIGHT
AND GODDARD AND SIR MADHAVAN NAIR
AND SIR JOHN BEAUMONT

Goonesinha — Appellant

v.

O. L. de Kretser — Respondent.

Privy Council Appeal No. 51 of 1943.

Certiorari — Writ of — Principle governing issue of.

A Court having jurisdiction to issue a writ of certiorari will not and cannot issue it to bring up an order made by a Judge of that Court. Nor will a superior Court issue the writ directed to another superior Court. Considering that the election Court under the Ceylon (States Council Elections) Order in Council, 1931, is held before a Judge of the Supreme Court of Ceylon from whose decision there is no appeal the election Court is a superior or independent tribunal and, therefore, the Supreme Court cannot issue a writ of certiorari to the election Court. Moreover the cognizance of the election petitions under the Order in Council is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court and consequently certiorari cannot be granted by the Supreme Court to bring up any order made in the exercise of that jurisdiction: (1883) 11 Q. B. D. 479, *Rel. on.* [P 84 C 2]

C. P. C. —

('44) Chitaley, S. 115, N. 2; Government of India Act, S. 107 N. 17.

('41) Mulla, Page 408, N. "Certiorari."

D. N. Pritt, P. V. Subba Row and Ralph Parikh — for Appellant.

Frank Gahan — for Respondent.

Lord Goddard. — On 26th April 1941, a by-election was held for the return of a member of the Ceylon State Council for the Electorate of Colombo North. The successful candidate was a Mr. de Silva, and the present appellant, who takes an active part in political and municipal affairs in Colombo, was one of his prominent supporters. Subsequently, a petition was presented to the Supreme Court of Ceylon, under the Ceylon (States Council Elections) Order in Council, 1931, asking that the election might be declared void and alleging general intimidation, treating and undue influence. In two instances undue influence on electors to cause them to vote for Mr. de Silva was alleged to have been exercised by the appellant, and in his judgment which was delivered on 22nd December 1941, the Election Judge, who is the present respondent, found

both these charges proved. The learned Judge thereupon ordered that notice should at once be given to the appellant in terms of Art. 79 (2) of the Order in Council to show cause why he should not be reported to His Excellency the Governor as having been guilty of a corrupt practice. The offence of undue influence, as defined by Art. 53 of the Order in Council is by Art. 55 declared to be a corrupt practice. The combined effect of Art. 55 (1) and Art. 79 (3) is that a person reported for a corrupt practice is rendered incapable of voting or being elected to the State Council for a period of seven years. The notice given to the appellant to show cause referred to only one of the cases found proved against him. On appearing to show cause the appellant, who had given evidence on the trial of the petition, desired to call nine witnesses, whose names he had previously given, with the object of proving that he was not guilty of the offence specified in the notice which the Election Judge had found proved. The learned Judge refused to hear these witnesses, on the ground that he could not be asked to reverse the findings which he had already made on the trial of the petition. He held that as by Art. 78 of the Order in Council his determination as to the validity of the election was final, it followed that his finding that a person had committed a corrupt or illegal practice must necessarily be final also, and he reported the appellant. The appellant then moved the Supreme Court for a mandate in the nature of a writ of certiorari to bring up what was called the order by which he was reported, though it would perhaps be more accurate to call it simply the report, and have it quashed. On 1st June 1942, the Chief Justice of Ceylon delivered judgment refusing to issue the mandate, holding that the Election Court in Ceylon was a Superior Court to which no writ in the nature of certiorari would lie. Against his refusal the Supreme Court gave the appellant leave to appeal to His Majesty in Council.

Their Lordships are of opinion that the judgment of the learned Chief Justice is plainly right. By Art. 75 of the Order in Council every election petition is to be tried by the Chief Justice or a Judge of the Supreme Court nominated by him and the Chief Justice or the nominated Judge are referred to in the Order as the Election Judge. By cl. 5 of this Article it is provided that unless otherwise ordered by the Chief Justice all interlocutory matters in connexion with a petition may be dealt with and decided by any Judge of the Supreme Court. Article 76 provides that an election petition may be presented to the Supreme Court by one or more of certain classes of persons. These two sections alone

would appear to show quite clearly that an election petition is a proceeding in the Supreme Court, and a reference to the rules of procedure which are enacted in Sch. 6 to the Order confirms, if confirmation were necessary, this view. Rule 4 gives the form a petition is to take and its heading is "In the Supreme Court of Ceylon." Rule 29 deals with the withdrawal of a petition which cannot be done without the leave of the Judge, that is the Election Judge. Sub-r. 2 of this Rule prescribes the affidavits which are to be filed on such an application, but provides that a Judge of the Supreme Court, and not only the Election Judge, may on special grounds dispense with the affidavit of any particular person. Again R. 37 provides that the petition is not to abate because a respondent dies, resigns, or gives notice to the Court that he does not intend to oppose the petition, and provision is made as to how and when notice is to be given to the Court. While the Ordinance constituting the Supreme Court does not confer upon it original, but only appellate jurisdiction in civil cases, their Lordships are of opinion that cognisance of election petitions is a special jurisdiction conferred upon the Supreme Court by the Order in Council, and that is abundantly clear from the provisions to which they have referred. It is well settled, and counsel did not seek to argue to the contrary, that a Court having jurisdiction to issue a writ of certiorari will not and cannot issue it to bring up an order made by a Judge of that Court. Nor will a Superior Court issue the writ directed to another Superior Court—(1883) 11 Q. B. D. 479¹—and if the Election Judge is to be regarded as a special or independent tribunal his Court would, in their Lordships' opinion, be a Superior Court. Considering that the Court is held before a Judge of the Supreme Court from whose decision there is no appeal, it could not be otherwise. But their Lordships are of opinion that the true view is that cognisance of these petitions is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court and consequently certiorari cannot be granted to bring up any order made in the exercise of that jurisdiction. As the appellant's motion was rightly rejected it is unnecessary to consider the other matters raised in the appeal and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

G.N.

Appeal dismissed.

Solicitors for Appellant — *Hy. S. L. Polak & Co.*
Solicitors for Respondent — *Burchells.*

1. (1883) 11 Q. B. D. 479 : 52 L. J. M. C. 121, Reg. v. Justices of the Central Criminal Court.

A. I. R. (32) 1945 Privy Council 85

(*From Trinidad and Tobago*)

17th October 1944

LORD CHANCELLOR (VISCOUNT SIMON)
AND LORDS WRIGHT, PORTER, SIMONDS
AND GODDARD

*Trinidad Lake Asphalt Operating Co.,
Ltd. — Appellant*

v.

*Commissioners of Income-tax for Colony
of Trinidad and Tobago —*

Respondents.

Privy Council Appeal No. 55 of 1942.

(a) Income-tax Ordinance for Colony of Trinidad and Tobago (1 of 1940), S. 5 — Taxation on non-resident imposed by S. 5 is valid—It is not extra-territorial—Income-tax Act, Ss. 4 and 4A.

There is no general rule of international comity which renders such taxation on non-residents as is provided for in S. 5, i. e., in respect of income derived from property in the colony, incompetent. Nor is it incompetent by reason of the circumstance that the colony cannot pass extra-territorial legislation. A tax in this form is not extra-territorial, so long as it does not affect to tax property not situate in the colony: (1889) 14 A.C. 493; 1926 A.C. 37 and (1927) 1 Ch. 107, *Rel. on*; ('35) 22 A. I. R. 1935 P.C. 158, *Ref.* [P 86 C 2]

(b) Income-tax Ordinance for Colony of Trinidad and Tobago (1 of 1940), S. 30 — S. 30 is not extra-territorial—Income-tax Act, Ss. 4 and 4A.

There is no ground for treating S. 30 as extra-territorial in effect or requiring it to be construed otherwise than in accordance with the ordinary meaning of the words used. The section must be construed according to its natural meaning whenever it applied. It is not extra-territorial merely because its purpose is indirectly to secure payment from the non-resident alien of the tax which is validly imposed upon him. The person directly affected is the statutory agent who is within the colony. The obligation is imposed directly on him. His liability is complete when within the colony he does the act which transmits the income to the non-resident. The transmission begins in the colony, though it continues until delivery to the non-resident alien: 1903 A. C. 471, *Approved.* [P 87 C 1]

(c) Income-tax Ordinance for Colony of Trinidad and Tobago (1 of 1940), S. 30 — Object of.

The object of S. 30 is clearly to create a statutory agent from whom the tax may be collected. He is made as it were vicariously liable for the tax in place of the non-resident recipient of the revenue with a right of indemnity over against, the person primarily liable for the tax. [P 87 C 2]

(d) Income-tax Ordinance for Colony of Trinidad and Tobago (1 of 1940), S. 30—Operation of — Word "transmits" in S. 30—Meaning of — *B* non-resident in colony of Trinidad holding shares in *T* company in Trinidad — *T* company declaring cash dividend in favour of *B* payable by cancellation of *T*'s claim in like amount against *B* — Transaction held constituted payment of dividend to *B* and amounted to transmission of "revenue" within S. 30 from *T* to *B* — *T* held liable as statutory agent for amount of tax on dividend — Words and phrases.

Section 30 does not expressly in words qualify "transmission" as meaning "from the colony." The word "transmit" in S. 30 includes transmission to a non-resident outside the limits of the colony. Transmission involves indeed an intermediate space, but does not depend on the extent of the space. The transmission of funds has become divorced in the minds of businessmen, and even of lawyers, from the idea of any material embodiment. No document is necessary. Two companies separated by the ocean, may orally agree over the wireless telephone that one's debt may be set against a debt of the other, and both cancelled. The only evidence or material embodiment of the transaction may consist of entries in the books on each side made in pursuance of their agreement. But what has happened is, if so intended, equivalent to a receipt of money, and a receipt of anything by a person who is at a distance from the sender, involves a transmission. [P 87 C 2; P 88 C 1, 2]

T company carried on business in the colony of Trinidad and Tobago. *B* who was a non-resident in the colony and carried on business in America held a number of shares in *T* company. The *T* company declared a dividend in favour of *B* payable by cancellation of *T*'s claim in a like amount against *B*. It was argued that the transaction did not involve a transmission of dividend to *B* and the conditions of S. 30 were not fulfilled:

Held that the transaction involved a transmission of "revenue" (dividend) within the meaning of S. 30 from *T* to *B*, with the consequence that *T* became liable as statutory agent for the amount of the tax on the dividend: (1873) 8 Ch. App. 407; 1902 A. C. 287 and (1886) 14 R. 98, *Rel. on.* [P 88 C 2]

Held further that it was not correct to say that S. 30 required for its operation three parties, the debtor, the creditor and an intermediary agent separate from either to transmit. A debtor may be treated as assuming in addition the functions of a statutory agent to transmit the money to the creditor. This, for instance, would obviously be true of a mortgagor, a class specifically mentioned in S. 30 and also of the dividend declared by and due from *T* the general words "income derived from any other source" in S. 30 being clearly sufficient to include dividends which were particularly mentioned in S. 5 (D), though not in S. 30 in express terms. [P 89 C 2]

J. Millard Tucker and N. G. Mustoe —
for Appellant.
Attorney General and R. P. Hills —
for Respondents.

Lord Wright.— This is an appeal from an order made on 1st April 1942, by the Full Court of the Supreme Court of Trinidad and Tobago, upon a case stated for the opinion of the Full Court by Perez J. whereby he dismissed an appeal by the appellant against an assessment to income-tax made by the Commissioners of Income-tax for the Colony on the appellant under S. 30, Income-tax Ordinance of 1940, Ch. 33, No. 1, then in force in the Colony. It is also an appeal against the order of Perez J. whereby in accordance with the judgment of the Full Court he formally dismissed the appeal of the appellant against the assessment. The assessment was on the sum of \$1,394,227.00, and was for the year 1940, the tax chargeable being \$336,424.75. If the appellant fails in its objec-

tions in law to the assessment it does not now dispute that the amount is correct.

The assessment was made in respect of a dividend amounting to \$1,207,817.06 declared by the appellant in favour of the Barber Asphalt Corporation of New Jersey, U.S.A. (hereinafter called "Barber") as the holder of 499,992 shares out of 500,000 shares constituting the issued capital of the appellant. The business of the appellant was to win and refine asphalt in the colony and sell and deliver it to purchasers, including Barber. The dividend was declared in accordance with a resolution of the appellant's directors dated 24th November 1939, on which date Barber owed to the appellant \$1,207,817 for asphalt purchased by it from the appellant. The resolution was in the following terms:

"Resolved that a dividend in the amount of \$1,207,817 be declared payable by cancellation of the Trinidad Lake Asphalt Company's claim in a like amount against Barber Asphalt Corporation and that in addition a cash dividend of equal proportion amounting to \$12.10 be paid to local share-holders making a total of \$1,207,829.16."

It was not in question that the resolution ought properly to be construed as compendiously embodying two items, (1) the declaration of a cash dividend of \$1,207,817.06 in favour of Barber, (2) an agreement between Barber and the appellant that the dividend was payable by cancellation of the appellant's claim against Barber for asphalt sold and delivered to him.

Barber was at all material times non-resident in the Colony. It carried on business at its head office in Barber, New Jersey in the United States. It had no place of business in the Colony and has never exercised or carried on any trade or business in the Colony. Perez J. held that the dividend was income of Barber accruing in, or derived from, the Colony within the meaning of S. 5 of the Ordinance and that Barber was accordingly liable to tax on the dividend. The appellant does not dispute that part of the judgment. It is clearly right and is in accordance with principles laid down by the House of Lords in regard to the territorial limits within which the imposition of income-tax is permissible. To quote one statement, it was said by Lord Herschell in the leading case in (1889) 14 A. C. 493¹ at page 504:

"The Income-tax Acts . . . themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom, or the person whose income is to be taxed must be resident there."

These words of Lord Herschell were quoted and applied by Lord Wrenbury in (1926)

1. (1889) 14 A. C. 493 : 59 L. J. Q. B. 53 : 61 L. T. 518 : 38 W. R. 289, *Colquhoun v. Brooks*.

A. C. 37² at p. 55, where the question was the chargeability to super-tax of a non-resident alien—an American subject residing in the United States. He was not in England but he drew a large income from property situated here. It was held that a non-resident alien was chargeable in respect both of income-tax and of the additional duty of income-tax called super-tax. So it was decided by all their Lordships. Other authorities to the same effect need not be quoted. Though the usual ground on which competency to tax is based, namely residence, did not exist in that case, the alternative ground, namely that the income was derived from property in the country which imposed the tax was sufficient. These principles apply to the Ordinance of 1940 which by S. 5 expressly provides for the imposition of tax upon the income of any person accruing in or derived from or received in the Colony in respect of (*inter alia*) dividends, interest or discounts. The authorities referred to show that there is no general rule of international comity which renders such taxation on non-residents incompetent. Equally, in their Lordships' judgment, it is not incompetent by reason of the circumstance that the Colony cannot pass extra-territorial legislation. A tax in this form is not extra-territorial, so long as it does not affect to tax property not situate in the Colony. On the ground that this rule was infringed it was held in (1927) 1 Ch. 107³ that the legislation there in question was extra-territorial inasmuch as it sought to impose or enforce taxation on a non-resident shareholder in respect of property not situate in the Colony, namely, dividends which were an English debt due in respect of shares locally situate in England. This decision was prior to the Statute of Westminster of 1931, the effect of which was discussed in (1935) A. C. 500⁴ at p. 516. The principle however still applies to a Colony like Trinidad.

Section 30 of the Ordinance, it was also said, if construed as the Full Court has done, might be regarded as extra-territorial in effect. But S. 30, under which the assessment is made, seeks legitimately to meet the difficulty that, as Barber is in New Jersey and not in Trinidad, the tax cannot be enforced against him since the Courts of one country will not enforce the revenue laws of another. The section is in the following terms:

2. (1926) 1926 A. C. 37 : 95 L. J. K. B. 165 : 134 L. T. 98 : 10 Tax. Cas. 88, *Whitney v. Inland Revenue Commissioners*.

3. (1927) 1 Ch. 107 : 96 L. J. Ch. 58 : 136 L. T. 436, *London and South American Investment Trust v. British Tobacco Co. (Australia)*.

4. (1935) 22 A.I.R. 1935 P. C. 158 : 157 I. C. 571 : 1935 A. C. 500 : 104 L. J. P. C. 58 : 153 L. T. 283, *British Coal Corporation v. The King*.

"Any resident agent, trustee, mortgagor or other person, who transmits rent, interest, or income derived from any other source within the Colony, to a non-resident person, shall be deemed to be the agent of such non-resident person, and shall be assessed and pay the tax accordingly."

There is in their Lordships' judgment no ground for treating this section as extra-territorial in effect or requiring it to be construed otherwise than in accordance with the ordinary meaning of the words used. It is not extra-territorial merely because its purpose is indirectly to secure payment from the non-resident alien of the tax which is validly imposed upon him. The person directly affected is the statutory agent, in this case the appellant, who is within the Colony. The obligation is imposed directly on him. His liability is complete when within the Colony he does the act which transmits the income to the non-resident. The transmission begins in the Colony, though it continues until delivery to the non-resident alien. Similarly in (1903) A. C. 471,⁵ the penalty was imposed on the steamer when she came back to an Australian port with the seals upon the bounded stores broken, though they had been broken outside territorial waters. The breaking of the seals and the use of the bounded stores were what it was intended to prevent or punish. But the condition of enforcing the law was the vessel's entering the territorial limits with the seals broken. So here the condition of the liability of the statutory agent was the transmitting of the income to the non-resident. Section 30 was accordingly not open to objection as exceeding the territorial limitations. Indeed Mr. Tucker did not contend that the Ordinance was invalid but he sought to impose a narrow construction which he said was necessary to avoid the objection. In their Lordships' opinion, the whole objection is baseless and the section must be construed according to its natural meaning whenever it applied. That left the substantial question whether it did apply on the facts in this case. It will now, in order to decide the question, be necessary to examine the facts more closely, with particular reference to the question whether the appellant transmitted the dividend to Barber in New Jersey. That is the second question of law stated for the opinion of the Court, and is in their Lordships' view the only one now material.

The dividend declared in the resolution of the appellant's Board created a debt due from the appellant to Barber. It was so far as local situation may be attributed to a debt, a debt which was locally situated in Trinidad.

It was a debt due from a Trinidad Company created and payable in Trinidad. The shareholder, Barber, was it is true resident in New Jersey, and the debt to him might in normal course have been paid by sending a dividend warrant or similar credit instrument by mail. In this particular case, the arrangement between the parties made previously to the resolution had the effect that instead of this method of payment being adopted the debt should be paid by cancellation of Barber's indebtedness to the appellant. The main contention on behalf of the appellant is that this does not involve a "transmission" of the dividend to Barber and that the conditions of S. 30 are not fulfilled, even if the word transmission is construed contrary to the appellant's submission as meaning in its context a transmission beyond the borders of the Colony. This is the gravamen of the argument; certain minor aspects may be left to be discussed later. The appellant's argument does not necessarily involve denying that there was payment of the dividend, though a subsidiary argument was put forward at one stage that the settlement by way of cancelling the debt for goods supplied and setting it against the dividend, was not payment but the antithesis of payment. It was, however, in their Lordships' opinion, payment.

Their Lordships at this stage accept that the word "transmit" means in the context "transmit" to a non-resident outside the limits of the Colony. It is true that "transmit" is in itself not decisive on this point. A dividend may be transmitted by the warrant being sent by post or by messenger to Tobago or any other place in the Colony and it may be so transmitted to a non-resident if he happened at the moment to be temporarily in passage through the Colony. That however would be a somewhat fanciful application of the word in this connexion. The object of S. 30 is clearly to create a statutory agent from whom the tax may be collected. He is made as it were vicariously liable for the tax in place of the non-resident recipient of the revenue with a right of indemnity over against, the person primarily liable for the tax. The company is not bound to deduct the tax, though it is entitled to do so. Such a method is not unknown in modern systems of taxation and can be paralleled from other systems. Section 30 does not expressly in words qualify "transmission" as meaning "from the Colony." But the normal case of transmission to a non-resident alien would be transmission out of the Colony, and that case must at least be covered. Was there then such a transmission? No actual money passed. If the dividend had been transmitted by a banker's draft sent by

5. (1903) 1903 A. C. 471 : 72 L. J. P. C. 123 : 89 L. T. 222, *Peninsular and Oriental Steam Navigation Coy. v. Kingston*.

the appellant to Barber, it could not have been questioned that the dividend had been transmitted. But the two companies might do their own banking transactions between themselves, and dispense with the intervention of banking facilities. The transaction involved the sending to Barber by the appellant and receipt by Barber from the appellant of the dividend. This was effected by the agreement that payment should be made by cancellation of the debt for goods supplied. This method had been mutually agreed before the dividend was declared. The agreement was carried out by each party making corresponding entries in its books. These were not merely book-keeping entries. They represented the actual receipt of the dividend by Barber, and the actual payment of it by the appellant to Barber, and concurrently the actual receipt by the appellant from Barber of payment of his debt for goods supplied. The composite and joint transaction in principle satisfies the description of a payment given by Mellish L. J. in (1873) 8 Ch. A. 407⁶ at page 414. "Nothing is clearer," he said:

"than if parties account with each other and sums are stated to be due on the one side and sums of an equal amount due on the other side of that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on each side had been paid. Indeed it is a general rule of law that in every case where a transaction resolves itself into paying money by A to B, and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form or ceremony of handing the money backwards and forwards."

This statement gives a description of what is often called a settlement in account or a set off, the word not being there used in the technical sense of the statutes of set off. There is actual, not merely notional or constructive payment of the indebtedness on either side. There is thus a "transmission" of funds whether the transmission is only across the table or is across the ocean. Transmission involves indeed an intermediate space, but does not depend on the extent of the space. Each party receives payment from the other; each party having received payment in this way makes in his turn the corresponding payment to the other. The transaction is necessarily bilateral. In (1873) 8 Ch. A. 407⁶ the transaction was capable of being completed within narrow limits of space, for instance, across a table or in a room or by letters sent from one street to another. But the mere space involved is not material. Lord Lindley, in (1902) A. C. 287⁷ at page 296 made some pertinent observations on the topic. He said:

6. (1873) 8 Ch. A. 407 : 42 L. J. Ch. 488, *Spargo's case*.

7. (1902) 1902 A. C. 287 : 71 L. J. K. B. 618, *Gresham Life Assurance Society v. Bishop*.

"First let us consider what is meant by the receipt of a sum of money. My Lords, I agree with the Court of appeal that a sum of money may be received in more ways than one, e. g., by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is created as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which your Lordships have to interpret. But to constitute the receipt of anything there must be a person to receive and a person from whom he receives, and something received by the former from the latter and in this case that something must be a sum of money. A mere entry in an account which does not represent such a transaction does not prove any receipt, whatever else it may be worth."

In the present case, no one could say that the entries in the books of the two companies did not represent a genuine transaction and a receipt of money in the form in which money is transmitted and received as between business men. Since 1902, the transmission of funds has become still more divorced in the minds of business men, and even of lawyers, from the idea of any material embodiment. No document is necessary. Two companies separated by the ocean, may orally agree over the wireless telephone that one's debt may be set against a debt of the other, and both cancelled. The only evidence or material embodiment of the transaction may consist of entries in the books on each side made in pursuance of their agreement. But what has happened is, if so intended, equivalent to a receipt of money, in Lord Lindley's words, and a receipt of anything by a person who is at a distance from the sender, involves a transmission. Hence, in their Lordships' opinion, the transaction in the present case involved a transmission of "revenue" within the meaning of s. 30 from the appellant to Barber, with the consequence that the appellant became liable as statutory agent for the amount of the tax.

Lord Lindley goes on a little later to develop the same point. It may be noted that he was dealing with a somewhat different subject-matter, namely, the liability of a resident taxpayer in respect of foreign revenue. That liability is in England limited to revenue "received in the United Kingdom." In (1902) A. C. 287⁷ the revenue was received by the company's office abroad and was employed abroad and no part was remitted to this country. It was held that there was in that case no receipt in the United Kingdom. Lord Lindley, however, distinguishing the case before him, referred with approval to (1886) 14 R. 98⁸ in

8. (1886) 14 R. 98: 2 Tax. Cas. 165, *Scottish Mortgage Co. of New Mexico v. Commissioner of Inland Revenue*.

which it had been held that there had been a receipt in the United Kingdom from the office abroad and thus described the position in the latter case:

"Money received by the company's agents abroad was clearly and unmistakably treated by the company as remitted to and received by it here, and money here was treated by the company as remitted abroad in exchange for it. The exchange was effected by a book entry; but that entry was the business mode of carrying out cross remittances which it would have been unbusiness like and even childish to have effected in any other way."

Though the application of the principle was different in certain ways from that in question here the difference was not pertinent to the crucial matter of principle now to be decided, namely, whether the mode of operation adopted was a transmission of revenue by the appellant to Barber. Lord Lindley referred to other decisions to the like effect and others have been cited to their Lordships. Their Lordships accordingly agree with the Courts below in holding that the dividend was transmitted by the appellant to Barber, and that S. 30 applies.

The same result would hold if S. 30 were construed as applicable to transmissions within the Colonies, as it might well be so far as the actual words go. And the same would be true if the settlement in account were treated as taking place within the Colony, as involving the cancellation of a debt namely the dividend, locally situate in the Colony, in return for the cancellation of another debt also so situate, namely the debt for goods supplied. The difficulty which their Lordships feel about applying this view to the facts is that Barber, a necessary party to the transaction, was outside the Colony. They, however, construe S. 30 as at least including transmission outside the Colony.

Section 30 was treated throughout the proceedings below as a self-contained section, defining the complete scope of its own operation. Before this Board, however, the appellant sought to raise the further points that S. 30 only authorised an assessment on a person who can be deemed to be an agent within the meaning of S. 26 (1) and only if an assessment on that footing is otherwise competent. It was further contended that S. 30 must also be read as qualified by S. 26 (4) which prohibits the making of an assessment on any person who is not an authorised person carrying on the regular agency of a non-resident person. Their Lordships find themselves unable in this appeal to deal with these contentions. They raise important questions of law on the construction of the Ordinance which their Lordships feel they could not properly decide without the benefit of the opinion of the Colonial

Judges who have not been asked to pass upon them. In addition the contentions seemed likely to involve questions of fact on which evidence might have been, but had not been, given. Their Lordships therefore do not express any opinion on these topics.

It was also suggested that S. 30 required for its operation three parties, the debtor, the creditor and an intermediary agent separate from either to transmit. Their Lordships see no ground for this embroidery of the simple and appropriate language of the section. A debtor may be treated as assuming in addition the functions of a statutory agent to transmit the money to the creditor. This, for instance, would obviously be true of a mortgagor, a class specifically mentioned in S. 30. The general words "income derived from any other source" are clearly sufficient to include dividends which are particularly mentioned in S. 5 (D), though not in S. 30 in express terms. Their Lordships are of opinion that the appeal fails on all points and should be dismissed and that the order appealed from should be affirmed. The appellant will pay the costs of the appeal. They will humbly so advise His Majesty.

G.N.

Appeal dismissed.

Solicitors for Appellant—*Lawrence, Messer & Co.*
Solicitors for Respondents — *Burchells.*

* **A. I. R. (32) 1945 Privy Council 89**
(*From Madras : ('42) 29 A. I. R. 1942*
Mad. 191 (S. B.).)

26th February 1945

LORDS THANKERTON, SIMONDS AND
GODDARD, SIR MADHAVAN NAIR
AND SIR JOHN BEAUMONT

Maharajah of Pithapuram — Appellant

v.

Commissioner of Income-tax, Madras —
Respondent.

Privy Council Appeal No. 33 of 1944.

* **Income-tax Act (1922, as amended by Act 7 of 1939), S. 16 (1) (c)** — Revocable transfer of assets by assessee in favour of daughters prior to Amending Act 7 of 1939—Income therefrom can be deemed to be of assessee under amended Section 16 (1) (c).

Under S. 3, Income-tax Act, the subject of charge is not the income of the year of assessment, but the income of the previous year. Since the expression "total income" in S. 6 (3), Finance Act, 1939, means total income as determined under Income-tax Act, 1922, as amended at the date of Finance Act, 1939, the income derived from assets transferred to daughters by assessee under revocable transfers before Income-tax (Amendment) Act, 1939, can be deemed to be income of the assessee. [P 90 C 2; P 91 C 1]

J. D. Caswell and N. E. Mustoe —

for Appellant.

J. M. Tucker and R. K. Handoo —

for Respondent.

the appellant to Barber, it could not have been questioned that the dividend had been transmitted. But the two companies might do their own banking transactions between themselves, and dispense with the intervention of banking facilities. The transaction involved the sending to Barber by the appellant and receipt by Barber from the appellant of the dividend. This was effected by the agreement that payment should be made by cancellation of the debt for goods supplied. This method had been mutually agreed before the dividend was declared. The agreement was carried out by each party making corresponding entries in its books. These were not merely book-keeping entries. They represented the actual receipt of the dividend by Barber, and the actual payment of it by the appellant to Barber, and concurrently the actual receipt by the appellant from Barber of payment of his debt for goods supplied. The composite and joint transaction in principle satisfies the description of a payment given by Mellish L. J. in (1873) 8 Ch. A. 407⁶ at page 414. "Nothing is clearer," he said:

"than if parties account with each other and sums are stated to be due on the one side and sums of an equal amount due on the other side of that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on each side had been paid. Indeed it is a general rule of law that in every case where a transaction resolves itself into paying money by A to B, and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form or ceremony of handing the money backwards and forwards."

This statement gives a description of what is often called a settlement in account or a set off, the word not being there used in the technical sense of the statutes of set off. There is actual, not merely notional or constructive payment of the indebtedness on either side. There is thus a "transmission" of funds whether the transmission is only across the table or is across the ocean. Transmission involves indeed an intermediate space, but does not depend on the extent of the space. Each party receives payment from the other; each party having received payment in this way makes in his turn the corresponding payment to the other. The transaction is necessarily bilateral. In (1873) 8 Ch. A. 407⁶ the transaction was capable of being completed within narrow limits of space, for instance, across a table or in a room or by letters sent from one street to another. But the mere space involved is not material. Lord Lindley, in (1902) A. C. 287⁷ at page 296 made some pertinent observations on the topic. He said:

6. (1873) 8 Ch. A. 407 : 42 L. J. Ch. 488, *Spargo's case*.

7. (1902) 1902 A. C. 287 : 71 L. J. K. B. 618, *Gresham Life Assurance Society v. Bishop*.

"First let us consider what is meant by the receipt of a sum of money. My Lords, I agree with the Court of appeal that a sum of money may be received in more ways than one, e. g., by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is created as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which your Lordships have to interpret. But to constitute the receipt of anything there must be a person to receive and a person from whom he receives, and something received by the former from the latter and in this case that something must be a sum of money. A mere entry in an account which does not represent such a transaction does not prove any receipt, whatever else it may be worth."

In the present case, no one could say that the entries in the books of the two companies did not represent a genuine transaction and a receipt of money in the form in which money is transmitted and received as between business men. Since 1902, the transmission of funds has become still more divorced in the minds of business men, and even of lawyers, from the idea of any material embodiment. No document is necessary. Two companies separated by the ocean, may orally agree over the wireless telephone that one's debt may be set against a debt of the other, and both cancelled. The only evidence or material embodiment of the transaction may consist of entries in the books on each side made in pursuance of their agreement. But what has happened is, if so intended, equivalent to a receipt of money, in Lord Lindley's words, and a receipt of anything by a person who is at a distance from the sender, involves a transmission. Hence, in their Lordships' opinion, the transaction in the present case involved a transmission of "revenue" within the meaning of s. 30 from the appellant to Barber, with the consequence that the appellant became liable as statutory agent for the amount of the tax.

Lord Lindley goes on a little later to develop the same point. It may be noted that he was dealing with a somewhat different subject-matter, namely, the liability of a resident taxpayer in respect of foreign revenue. That liability is in England limited to revenue "received in the United Kingdom." In (1902) A. C. 287⁷ the revenue was received by the company's office abroad and was employed abroad and no part was remitted to this country. It was held that there was in that case no receipt in the United Kingdom. Lord Lindley, however, distinguishing the case before him, referred with approval to (1886) 14 R. 98⁸ in

8. (1886) 14 R. 98: 2 Tax. Cas. 165, *Scottish Mortgage Co. of New Mexico v. Commissioner of Inland Revenue*.

which it had been held that there had been a receipt in the United Kingdom from the office abroad and thus described the position in the latter case :

"Money received by the company's agents abroad was clearly and unmistakably treated by the company as remitted to and received by it here, and money here was treated by the company as remitted abroad in exchange for it. The exchange was effected by a book entry; but that entry was the business mode of carrying out cross remittances which it would have been unbusiness like and even childish to have effected in any other way."

Though the application of the principle was different in certain ways from that in question here the difference was not pertinent to the crucial matter of principle now to be decided, namely, whether the mode of operation adopted was a transmission of revenue by the appellant to Barber. Lord Lindley referred to other decisions to the like effect and others have been cited to their Lordships. Their Lordships accordingly agree with the Courts below in holding that the dividend was transmitted by the appellant to Barber, and that S. 30 applies.

The same result would hold if S. 30 were construed as applicable to transmissions within the Colonies, as it might well be so far as the actual words go. And the same would be true if the settlement in account were treated as taking place within the Colony, as involving the cancellation of a debt namely the dividend, locally situate in the Colony, in return for the cancellation of another debt also so situate, namely the debt for goods supplied. The difficulty which their Lordships feel about applying this view to the facts is that Barber, a necessary party to the transaction, was outside the Colony. They, however, construe S. 30 as at least including transmission outside the Colony.

Section 30 was treated throughout the proceedings below as a self-contained section, defining the complete scope of its own operation. Before this Board, however, the appellant sought to raise the further points that S. 30 only authorised an assessment on a person who can be deemed to be an agent within the meaning of S. 26 (1) and only if an assessment on that footing is otherwise competent. It was further contended that S. 30 must also be read as qualified by S. 26 (4) which prohibits the making of an assessment on any person who is not an authorised person carrying on the regular agency of a non-resident person. Their Lordships find themselves unable in this appeal to deal with these contentions. They raise important questions of law on the construction of the Ordinance which their Lordships feel they could not properly decide without the benefit of the opinion of the Colonial

Judges who have not been asked to pass upon them. In addition the contentions seemed likely to involve questions of fact on which evidence might have been, but had not been, given. Their Lordships therefore do not express any opinion on these topics.

It was also suggested that S. 30 required for its operation three parties, the debtor, the creditor and an intermediary agent separate from either to transmit. Their Lordships see no ground for this embroidery of the simple and appropriate language of the section. A debtor may be treated as assuming in addition the functions of a statutory agent to transmit the money to the creditor. This, for instance, would obviously be true of a mortgagor, a class specifically mentioned in S. 30. The general words "income derived from any other source" are clearly sufficient to include dividends which are particularly mentioned in S. 5 (D), though not in S. 30 in express terms. Their Lordships are of opinion that the appeal fails on all points and should be dismissed and that the order appealed from should be affirmed. The appellant will pay the costs of the appeal. They will humbly so advise His Majesty.

G.N.

Appeal dismissed.

Solicitors for Appellant—*Lawrence, Messer & Co.*
Solicitors for Respondents — *Burchells.*

* A. I. R. (32) 1945 Privy Council 89

(From Madras : ('42) 29 A. I. R. 1942
Mad. 191 (S. B.).)

26th February 1945

LORDS THANKERTON, SIMONDS AND
GODDARD, SIR MADHAVAN NAIR
AND SIR JOHN BEAUMONT

Maharajah of Pithapuram — Appellant

v.

*Commissioner of Income-tax, Madras —
Respondent.*

Privy Council Appeal No. 33 of 1944.

* Income-tax Act (1922, as amended by Act 7 of 1939), S. 16 (1) (c) — Revocable transfer of assets by assessee in favour of daughters prior to Amending Act 7 of 1939—Income therefrom can be deemed to be of assessee under amended Section 16 (1) (c).

Under S. 3, Income-tax Act, the subject of charge is not the income of the year of assessment, but the income of the previous year. Since the expression "total income" in S. 6 (3), Finance Act, 1939, means total income as determined under Income-tax Act, 1922, as amended at the date of Finance Act, 1939, the income derived from assets transferred to daughters by assessee under revocable transfers before Income-tax (Amendment) Act, 1939, can be deemed to be income of the assessee. [P 90 C 2; P 91 C 1]

J. D. Caswell and N. E. Mustoe —

for Appellant.

J. M. Tucker and R. K. Handoo —

for Respondent.

Lord Thankerton. — This appeal arises on a reference by the Commissioner of Income-tax, Madras, on the requisition of the appellant, under S. 66 (2), Income-tax Act, 1922, of the following question of law, viz. :

"Whether the income of the year 1938-39 derived from the assets comprised in the revocable instruments of trust and settlement executed by the petitioner in favour of his four daughters on 5th April 1933, i. e., before the commencement of the Indian Income-tax Act, 7 of 1939, can be deemed to be income of the petitioner under revocable transfers of assets as contemplated by cl. (c) of sub-s. (1) of S. 16, Indian Income-tax Act, 11 of 1922, as amended by the Indian Income-tax (Amendment) Act, 7 of 1939." For the year 1939-1940, the appellant was assessed to income-tax on a total income of Rs. 2,19,640, which included a sum of Rupees 1,77,374, representing the total of the income arising from assets settled on his four daughters by the appellant by four deeds, all dated 5th April 1933, and all of which, subject to the necessary variation in the name of the particular beneficiary, were subject to the same conditions, viz. : (i) the properties were to be held in trust for each of his daughters by the appellant during his lifetime as trustee and after his death by his eldest son, the Yuvarajah of Pithapuram, as trustee; (ii) the properties were to be held in trust for each of the daughters for life and on their death, for their issue, male and female, and, in the event of any of the said daughters dying without issue, the properties were to revert to the holder for the time being of the Pithapuram estate; (iii) the appellant reserved to himself the full power to revoke the settlement or make any fresh disposition he liked; (iv) the trustee for the time being had the right to convert (into money) the properties described in the schedules and invest the same in any of the recognised securities under the Trust Act; (v) so long as the appellant was the trustee he had the absolute and uncontrolled discretion to invest in any kind of securities as he liked and without reference to the provisions of the Trust Act.

In each year of assessment up to and including the year 1938-1939, the income arising from the properties settled on each of the daughters was assessed separately in the name of each, though the assessment was made on the appellant as their trustee. In the assessment year 1939-1940, the Income-tax Officer sought to apply an alteration in the law enacted by S. 18, Income-tax (Amendment) Act, 1939 (Act 7 of 1939), which came into force on 1st April 1939, by virtue of a Government Notification in terms of S. 1 (2) of the Act, and to treat the income of the daughters as the income of the appellant. The appellant's objections to this course have so far been without success, and are the subject of this appeal.

The material part of S. 18 of the Act of 1939 is as follows :

"18. In S. 16 of the said Act,—

(a) for sub-ss. (1) and (2) the following sub-sections shall be substituted, namely :

(1) In computing the total income of an assessee—

(c) all income arising to any person by virtue of a settlement or disposition whether revocable or not, and whether effected before or after the commencement of the Indian Income-tax (Amendment) Act, 1939, from assets remaining the property of the settlor or disponent shall be deemed to be income of the settlor or disponent, and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor :

Provided that for the purposes of this clause a settlement, disposition or transfer shall be deemed to be revocable if it contains any provision for the re-transfer directly or indirectly of the income or assets to the settlor, disponent or transferor, or in any way gives the settlor, disponent or transferor a right to reassume power directly or indirectly over the income or assets :

Provided further that the expression 'settlement or disposition' shall for the purposes of this clause include any disposition, trust, covenant, agreement, or arrangement, and the expression 'settlor or disponent' in relation to a settlement or disposition shall include any person by whom the settlement or disposition was made :

Provided further that this clause shall not apply to any income arising to any person by virtue of a settlement or disposition which is not revocable for a period exceeding six years or during the lifetime of the person and from which income the settlor or disponent derives no direct or indirect benefit but that the settlor shall be liable to be assessed on the said income as and when the power to revoke arises to him."

Before dealing with the particular grounds of appeal, their Lordships consider it desirable to make some general observations as to Indian income-tax law, which may clear away a certain confusion of thought which would appear to affect certain of the contentions in the present case. In the first place, it is clear to their Lordships that under the express terms of S. 3, Income-tax Act, 1922, the subject of charge is not the income of the year of assessment, but the income of the previous year. This is in direct contrast to the English Income-tax Acts, under which the subject of assessment, is the income of the year of assessment, though the amount is measured by a yardstick based on previous years. The difference is well illustrated by the distinction that in England the source of income must still be extant in the year of assessment but that that is not of relevance in India. Their Lordships may refer to the able judgment of Rankin C. J. in 2 I. T. C. 328,¹ with which they agree.

In the second place, it should be remembered that the Income-tax Act, 1922, as amended from time to time, forms a code, which has no operative effect except so far as it is ren-

1. (27) 14 A. I. R. 1927 Cal. 553 : 54 Cal. 630 : 103 I. C. 609 : 2 I. T. C. 328, Behari Lal Mullick v. Commissioner of Income-tax, Bengal.

dered applicable for the recovery of tax imposed for a particular fiscal year by a Finance Act. This may be illustrated by pointing out that there was no charge on the 1938-1939 income either of the appellant or his daughters, nor assessment of such income, until the passing of the Finance Act of 1939, which imposed the tax for 1939-1940 on the 1938-1939 income and authorised the present assessment. By sub-s. (1) of S. 6, Finance Act, 1939, income-tax for the year beginning on 1st April 1939, is directed to be charged at the rates specified in Part I of Sch. 2, and rates of super-tax are also provided for, and by sub-s. (3) it is provided that :

"for the purpose of this section and of Sch. 2, the expression 'total income' means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Income-tax Act, 1922."

This can only refer to the Income-tax Act, 1922, as it stood amended at the date of the Finance Act, 1939, and necessarily includes the alterations made by the Amending Act, which had already come into force on 1st April 1939.

In this view, the only question is whether the income arising from the properties settled by the four deeds under consideration, falls within the terms of S. 16 (1) (c), Income-tax Act. The first question would naturally be whether under these four deeds the assets from which the income arose remained the property of the appellant, or whether they involved a transfer of assets, though clearly a revocable transfer. From the way in which the present case has been presented throughout, including the hearing before the Board, their Lordships find it unnecessary to consider this question or to express any view on the matter. In the question referred, these deeds are regarded as involving revocable transfers of assets; in their judgment the High Court state: "It is admitted, as it must be, that the deeds executed by the assessee operate to transfer the assets"; and, at the hearing before the Board, both parties accepted the same view. The only argument left to the appellant was to found on the express insertion of the words "whether effected before or after the commencement" of the 1939 Amending Act in the first category of settlements, and their absence in the latter case of revocable transfers of assets, and to seek to derive therefrom an implied exclusion in the latter case of transfers effected prior to the commencement of the Amending Act, viz., 1st April 1939. Their Lordships can find no reason to justify such an alteration of the plain words of the section, which would involve the insertion after the words "a revocable transfer of assets" of the limiting words, "effected

after the commencement of the Indian Income-tax (Amendment) Act, 1939."

Accordingly their Lordships are of opinion that the decision of the High Court was right and should be affirmed and they will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the respondent's costs of the appeal.

R.K.

Appeal dismissed.

Solicitors for Appellant—*Douglas Grant & Dold.*

Solicitors for Respondent —

Solicitor, India Office.

* A. I. R. (32) 1945 Privy Council 91

(From Lahore: ('42) 29 A. I. R.
1942 Lah. 6)

30th April 1945

LORD GODDARD, SIR MADHAVAN NAIR
AND SIR JOHN BEAUMONT

Kesar Chand and others — Appellants
v.

Uttam Chand and others—Respondents.

Privy Council Appeal No. 57 of 1943.

* (a) Transfer of Property Act (1882), S. 68 —
Charge-holder cannot avail of S. 68.

The privilege conferred by S. 68 on a mortgagee to sue for money cannot be availed of by a charge holder, in proceedings in execution of a decree, without resorting to a suit, even if the security has been impaired by the conduct of the person creating the charge.

[P 94 C 1]

* (b) Hindu law—Debts—Father—Son's liability — Pious obligation — Security by father for third parties' debts—Doctrine of pious obligation does not apply.

Where the security bond is executed by a Hindu father not for the payment of any debt due by him, but for payment of a debt which was due from third parties, the doctrine of pious obligation of the sons to pay their father's debt cannot make the transaction binding on the ancestral property. [P 94 C 1]

(c) Deed—Construction—Surety bond — Immoveable properties charged—Bond held created no personal liability—Unsecured property could not be sold in enforcement of security bond : ('42) 29 A.I.R. 1942 Lah. 6, *REVERSED*.

On an application for stay of execution, the appellate Court granted stay if the appellants furnished security in the form of a charge upon immoveable property. *U* executed a security bond which stated "I (*U*) stand surety for *H* and other (appellants)." It further provided as follows: "and agree that . . . my moveable and immoveable properties detailed hereunder shall be liable":

Held that the security bond limited the scope of the liability to proceedings against the properties specified only, thus creating a charge on them excluding all personal liability. Hence unsecured property could not be sold in enforcement of the bond : ('42) 29 A.I.R. 1942 Lah. 6, *REVERSED*.

[P 93 C 2]

P. V. Subba Rao and R. Parikh —

• for Appellants.

Sir T. Strangman and J. M. Parikh —

for Respondent 2.

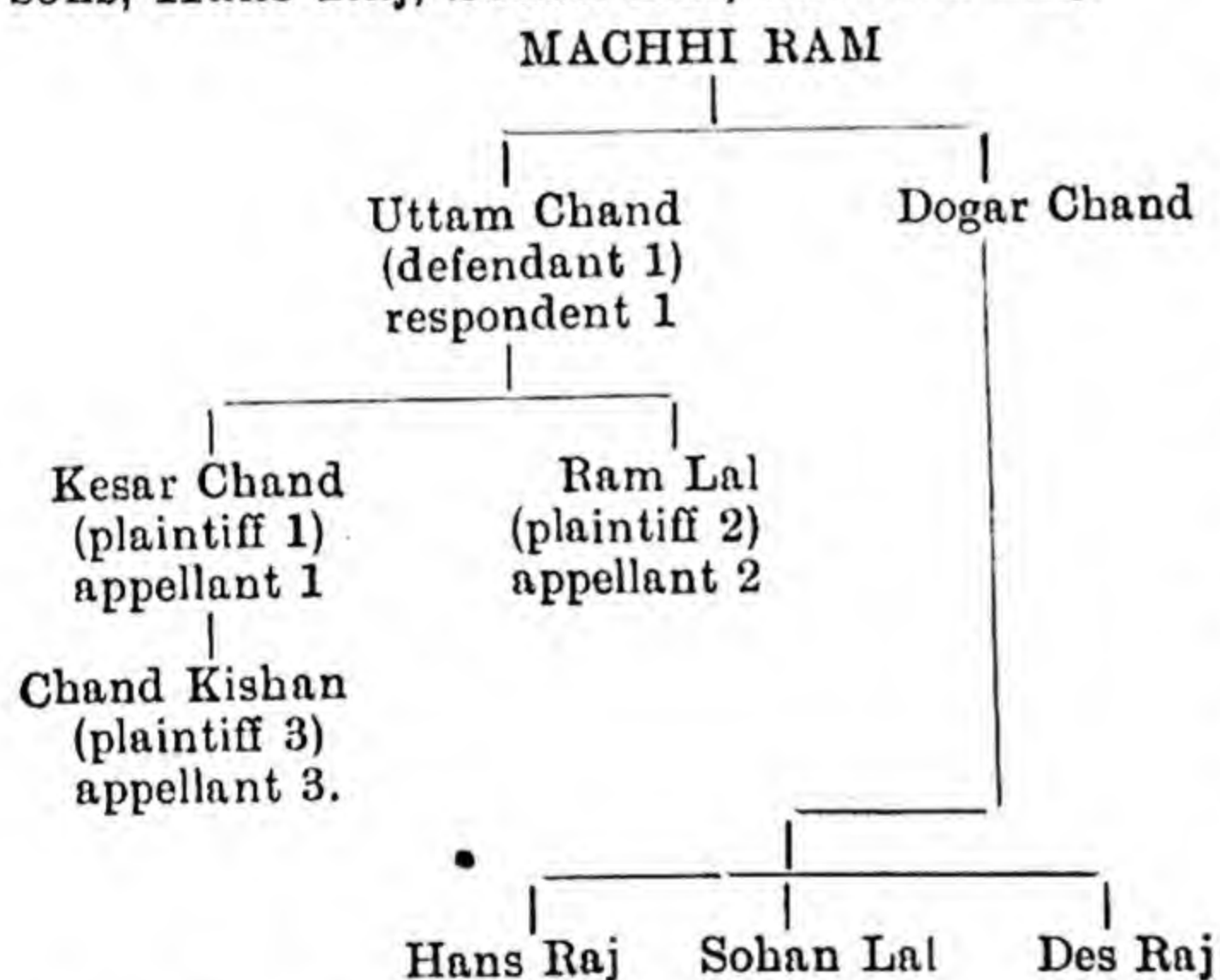
Sir Madhavan Nair.—This is an appeal from a decree of the High Court of Judicature

at Lahore dated 16th May 1941, which affirmed a decree of the Court of the Subordinate Judge, First Class, Montgomery, dated 29th May 1939, and dismissed the plaintiffs' suit.

The appeal arises out of a suit instituted by the plaintiffs—appellants before the Board—for setting aside the sale and for possession of the properties mentioned in the plaint which were sold by Court in execution of a decree, by reason of a surety bond executed by their father Uttam Chand in the circumstances mentioned below. The properties in dispute have been found to be ancestral.

The main question arising for decision in this appeal is whether the above-mentioned surety bond creates or gives rise to a personal liability on Uttam Chand.

Uttam Chand and Dogar Chand, shown in the pedigree given below, were two separated Hindu brothers. Kesar Chand and Ram Lal—appellants 1 and 2—are the sons of Uttam Chand; Chand Kishan—appellant 3—is the son of Kesar Chand and grandson of Uttam Chand. Uttam Chand and the three appellants constituted a joint Hindu family. Dogar Chand died leaving a widow, and three minor sons, Hans Raj, Sohan Lal, and Des Raj.



On 1st July 1927, respondent 2, Nand Lal, obtained a preliminary mortgage decree against the minor sons of Dogar Chand, represented by their guardian Uttam Chand, on the basis of a mortgage executed by their mother, for Rs. 7748, with interest and costs. This decree was made final on 21st January 1928. Hans Raj and his brothers through their guardian appealed to the High Court against the decree, and prayed for a stay of the execution of the proceedings which had been taken by the decree-holder. The stay asked for was granted by Coldstream J. who passed the following order on 11th May 1928. :

"Mr. Anant Ram [Counsel for Nand Lal] asks that his clients may in any case be secured by a charge upon immovable property against loss if the sale is stayed. I think this is a reasonable argument and, having in view all the circumstances, I order

that the property be not sold if the petitioners can furnish security in the form of a charge upon immovable property to the satisfaction of the executing Court for paying to the decree-holder in the event of the failure of their appeal, the amount by which the price fetched by the mortgaged property when sold under the decree falls short of the amount then found due to the decree-holder under the provisions of the final decree"

Thereupon Uttam Chand executed a security bond on 31st July 1928, in the following form, after stating that the High Court had called upon him to file a security bond to the effect that if the decree money and costs, etc., are not recovered in full from the land he would be liable to make good the deficiency:

"Hence I hereby stand as surety for Hans Raj and others, minors, judgment-debtors, and agree that in the event of the appellate Court's decision being against the judgment-debtors, my moveable and immovable properties, detailed hereinafter, shall be liable for making good the deficiency, if the sale proceeds of the hypothecated property are not sufficient to meet the demand, i. e., the amount which may then be found due from the judgment-debtors according to the decision."

The above statement is followed by a list of some items of moveable property, though their security was not called for, and three items of immovable property.

The appeal before the High Court was compromised, and the Court passed a mortgage decree in terms of the compromise, providing that the property should remain under attachment and that "the security furnished by the surety shall also stand."

As the mortgage debt was not paid in time, the decree-holder took out execution and had the mortgaged property sold. As the decree debt was not realised in full by the sale, the four items of property involved in the suit, which included only one item of secured property, were sold in execution, as before his liability had occurred Uttam Chand had transferred almost all the properties included in the security bond. As stated by the Subordinate Judge,

"it is common ground between the parties that the whole of the property in dispute is outside the scope of the security bond executed by Uttam Chand excepting the house which was purchased by Gehla Ram, defendant 3."

Barring this house, the other properties were purchased by Nand Lal, the decree-holder and respondents 4 to 9 have purchased different plots of land from him after the execution sale had been confirmed in his favour by the executing Court. It is admitted that Nand Lal has paid Rs. 646-5-0 in discharge of two mortgages on the land purchased by him in the course of the execution.

Their Lordships will now proceed to consider whether the sale of the properties in dispute found to be ancestral, in enforcement of the security bond executed by Uttam Chand, is valid in law and binding on the

appellants, his sons and grandson. The liability of the appellants is sought to be based on the pious obligation imposed on a Hindu son to pay his father's debts. In this connexion it may be stated that the appellants did not allege that the debt said to have been incurred by Uttam Chand for which the properties have been sold is an immoral one, nor did the respondents allege that it was raised for the benefit of the family.

The Subordinate Judge held that the security bond was an instrument of charge only and did not create any personal liability, that Uttam Chand had laid himself open to personal liability by reason of his having admittedly transferred a major portion of the properties included in the bond, that the sale of properties not covered by the security bond was justified by the principle expressed in S. 68 (1) (c), T. P. Act, which says that

"the mortgagee has a right to sue for the mortgage money", . . . , "where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor"

and that he was competent to charge family property by the execution of the security bond as the rule of Hindu law forbidding alienations of family property or the creation of charges thereon except for family necessity or for an antecedent debt of the father did not apply to charges created by the father as surety. In the result, he dismissed the appellants' suit. The learned Judges of the High Court disagreeing with the Subordinate Judge held that

"on a true construction of the security bond, Uttam Chand had undertaken personal liability, and that it is not possible at that stage to re-open the execution proceedings by holding that no such liability could be enforced."

The latter ground appears to be based on the reasoning stated at the close of the immediately preceding paragraph of the judgment that

"the executing Court acted on the assumption that Uttam Chand had undertaken a personal liability and this assumption does not appear to have been challenged at any stage of the proceedings,"

but it must be noticed that the sons and grandson of Uttam Chand have a valid right of challenging that assumption by instituting a suit if they can make out a proper case. In the view which the learned Judges took, which they thought was "sufficient to conclude the case", the question of pious obligation did not seem to them to arise for decision; however, they did not consider it, but nothing turns upon that now. Before passing, it may be mentioned that the learned Judges were not prepared to accept the view of the trial Court that the executing Court would in any case

have been entitled to act as it did by virtue of the provisions of S. 68, T. P. Act.

Mr. Subba Rao, the learned counsel for the appellants, contended before the board that Uttam Chand was not personally liable under the terms of the security bond, and that in reality there was no debt due by him outstanding in consequence of which family property, either secured or unsecured, could be sold. The main question for their Lordships to consider is whether the security bond imposes any personal liability on Uttam Chand, for unless this is established first, properties other than those covered by the security bond can in no event be validly sold. It was argued by Sir Thomas Strangman that the expression "I stand surety for Hans Raj and others" appearing at the commencement of the operative portion of the deed to which their Lordships have already called attention, means I promise to pay, and imports personal liability. The argument is not without some force, but their Lordships have, after careful consideration, come to the conclusion that the statement which immediately follows the expression referred to, namely, "and agree that . . . my moveable and immovable properties detailed hereunder shall be liable" qualifies it and limits the scope of the liability to proceedings against the properties specified only, thus creating a charge on them excluding all personal liability. That this is the proper construction that should be put upon the document appears to be clear from the order passed by Coldstream J. when he stayed the execution of the decree. That order states clearly that the property should not be sold if the petitioners can furnish surety "in the form of a charge upon immovable property" and it was complied with by Uttam Chand by executing the bond in question. Their Lordships pointed out in A. I. R. 1932 P.C. 131,¹ where the construction of a security bond executed in pursuance of an order passed by the Court arose for decision that it "must be considered in the light of the order directing security to be given." Read in the light of Coldstream J.'s order, there can be no doubt that the obligation undertaken by Uttam Chand was merely confined to the extent of the properties charged by him for the satisfaction of the amount. Another argument urged by the learned counsel in support of his contention, viz., that the appropriate form of the bond in a case of this kind, as may be seen from App. G, Civil P. C., would clearly provide for a personal liability, and that the order for furnishing security must therefore

1. ('32) 19 A. I. R. 1932 P. C. 131 : 136 I. C. 629 (P.C.), Raja Raghunandan Prasad Sing v. Raja Kirtyanand Singh.

be construed as having been made with reference to such a form, overlooks the fact that the order of the Court is perfectly clear, and what their Lordships are called upon to do is to construe a specific document with reference to its specific terms, and if need be in the light of the Court's order which, as they have already stated, is not open to any doubt. The next argument, that the inclusion of the moveable properties in the deed would suggest that Uttam Chand had thereby undertaken personal liability, cannot be accepted as the terms of the document do not impose any such liability and nothing is known as to why those items were included in the deed. The last argument advanced in this connexion, that even if there is no personal liability originally incurred by Uttam Chand under the stipulations of the security bond, he became personally liable as he had transferred a major portion of the property included by him in the security bond, should also be disallowed as it was not made clear to their Lordships how in the present case the privilege conferred by S. 68, T. P. Act, on a mortgagee to sue for money can be availed of by a charge holder, in proceedings in execution of a decree, without resorting to a suit, assuming that the security has been impaired by the conduct of Uttam Chand which itself is open to some doubt. For these reasons, their Lordships hold that as it is not shown that Uttam Chand has made himself personally liable for the amount that remained due to the decree-holder there was no debt due from him, and it follows therefore that the unsecured property in question cannot be validly sold in enforcement of the security bond. The same is the position with regard to the secured property also. To make the ancestral property liable, there must in reality be a debt due by the father. In the present case, the security bond was executed not for the payment of any debt due by Uttam Chand, but for payment of a debt which was due from third parties. Unless there was a debt due by the father for which the security bond was executed, the doctrine of pious obligation of the sons to pay their father's debt cannot make the transaction binding on the ancestral property.

For the foregoing reasons their Lordships are of opinion that this appeal should be allowed and that the decrees of the Courts in India should be set aside and that it should be declared that the security bond dated 31st July 1928 executed by Uttam Chand in Nand Lal v. Hans Raj and others is not binding on the appellants or on the properties comprised therein; that the sale proceedings in execution of the decree of defendant 2 in Nand Lal v. Hans Raj and others relating to the joint

family properties of the appellants and defendant 1 (described in para. 4 and list A of the plaint) are null and void and (a) the purchasers at the auction sales, namely, Nand Lal and Gehla Ram defendant 3 and (b) the alienees of Nand Lal, namely, defendants 4 to 9 acquired no title to the said properties; that each of defendants 2 to 9 do put the appellants and defendant 1 in possession of such of the properties described in para. 4 and list A of the plaint as he may be possessed of; so far as defendant 2 is concerned on being paid Rs. 646-5-0; and that defendants 2 to 9 should pay the appellants the costs of this appeal and their costs incurred in the High Court and the Court of the Subordinate Judge, First Class, Montgomery. It is said that defendants 2 to 9 have been in possession of the properties and have deprived the appellants' family of possession and enjoyment of the same and that it is just and right that they should account for the profits received or which might have been received by them. Their Lordships think that whatever rights the appellants may have in this respect should be claimed by them in a separate suit which will not be barred by these proceedings. Their Lordships will humbly advise His Majesty accordingly.

R.K.

*Appeal allowed.*Solicitors for Appellants — *Lambert & White.*Solicitors for Respondent 2—*T. L. Wilson & Co.*

*** * A. I. R. (32) 1945 Privy Council 94**
(*From Lahore : ('40) 27 A. I. R. 1940*
Lah. 203)

5th February 1945

LORDS RUSSELL OF KILLOWEN, WRIGHT
AND GODDARD, SIR MADHAVAN NAIR
AND SIR JOHN BEAUMONT

*Lala Jairam Das and others**Appellants*

v.

Emperor.

Privy Council Appeal No. 87 of 1944.

* * Criminal P. C. (1898), Ss. 496-502 and 561A—Bail cannot be granted in inherent power — Leave to appeal granted by Privy Council — Still High Court cannot grant bail.

Chapter 39 of the Code together with S. 426 contains a complete and exhaustive statement of the powers of a High Court in India to grant bail, and excludes the existence of any additional inherent power in a High Court relating to the subject of bail. Section 561A of the Code confers no powers. It merely safeguards all existing inherent powers possessed by a High Court necessary (among other purposes) to secure the ends of justice. [P 98 C 1]

The only granting of bail which is referred to in that chapter (which consists of Ss. 496 to 502 inclusive) is the granting of bail to accused persons. There is no reference therein to the granting of bail to persons who have been tried and convicted. The Code confers no power on a High Court to grant bail

in the case of a convicted person except under S. 426. Hence, a High Court in India has no power to grant bail to a person who has been convicted and sentenced to imprisonment, and to whom His Majesty in Council has given special leave to appeal against his conviction or sentence : *Case law referred.* [P 97 C 1, 2]

D. N. Pritt and S. P. Khambatta —
for Appellants.

B. J. McKenna — for the Crown.

Lord Russell of Killowen.—This appeal raises an important question, viz., whether a High Court in India has power to grant bail to a person who has been convicted and sentenced to imprisonment, and to whom His Majesty in Council has given special leave to appeal against his conviction or sentence. The questions which arise for consideration in such a case are of such a nature that they can only, their Lordships think, be properly dealt with by some authority in India possessing either knowledge of the relevant facts, or the means of acquiring that knowledge; but whether a High Court in India has power to grant bail in the circumstances indicated is a matter upon which divers views have been expressed in the Courts in India, and which comes before the Board for the first time, in the following circumstances: The appellants were convicted under S. 120B read with S. 420, Penal Code, and sentenced to terms of rigorous imprisonment. On appeal, the High Court of Lahore upheld the convictions but altered the sentences. The appellants, having obtained special leave from His Majesty in Council to appeal from the judgments of the High Court, applied to the High Court of Lahore to be released on bail. Their application was dismissed. From that dismissal they now appeal by special leave to His Majesty in Council. The application was dismissed upon the ground that the Judicial Committee had given no direction that an application for bail should be made to the High Court. It will be convenient at the outset to review briefly the decisions in India. In the year 1900, the High Court of Madras held (in a case in which special leave to appeal had been granted) that it had power to make an order for release on bail pending the decision of the appeal: *see* 24 Mad. 161.¹ On the petition for special leave, and application for bail had also been made, when the Judicial Committee stated that any such application must be dealt with by the High Court. The case was argued before the High Court on the footing that the High Court could act under S. 498, Criminal P. C., (herein referred to as the Code). The judgment simply states:

"In our opinion this Court has jurisdiction to make an order in this case releasing the accused on bail pending the decision of the Privy Council."

1. ('01) 24 Mad. 161, *Queen-Empress v. Subrahmanya Ayyar*.

In the year 1908 in 15 P.R.Cr. 1908 at p. 50² the Chief Court, which had previously dismissed an appeal from their convictions by the accused persons, dismissed an application by them to be released on bail pending the hearing of a petition by them to His Majesty in Council for special leave to appeal. The application seems to have been based on S. 498 of the Code; but it was held that S. 498 "does not refer to a case where the Court is functus officio, but refers to cases where the Court has still some power left as regards the sentence of the accused," and that the Court had no power to release the accused on bail. In February 1923, the case in 50 Cal. 585³ came before the High Court of Calcutta. A convicted person applied under S. 498 of the Code for a stay of execution of the sentence pending the hearing of a proposed application to His Majesty in Council for special leave to appeal. It was decided that the High Court had no jurisdiction under S. 498. The Chief Justice indicated that the High Court might have had jurisdiction by reason of cl. (41) of the Court's Letters Patent if the case had come within that clause, which it did not. Richardson J. distinguished the Madras case on the ground that in that case special leave to appeal had already been obtained. He was of opinion that the Court had no jurisdiction under S. 498 to grant bail pending an application for special leave to appeal. The Court was functus officio, and had no seisin of the case. Nor had the Court any inherent jurisdiction. He pointed out, however, that it was open to the Local Government to suspend the sentence under S. 401 of the Code. On 2nd April 1923, the Code of Criminal Procedure (Amendment) Act, 1923, came into force by which there was added to the Code S. 561A which runs thus:

"561A. Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

In 1926, in 49 ALL. 247⁴ the High Court of Allahabad held that "a High Court has certainly inherent jurisdiction to stay execution of its own order when the ends of justice require it." It refused to grant bail at that stage because special leave to appeal had not yet been obtained; a petition had been lodged but had not been heard by the Judicial Committee. The applicant, however, was told to apply again when leave to appeal had been granted. In 1936 another case came before the High

2. ('08) 15 P. R. Cr. 1908 at p. 50, *Diwan Chand v. King-Emperor*.

3. ('24) 11 A. I. R. 1924 Cal. 64 : 50 Cal. 585 : 72 I. C. 362, *Tulsi Telini v. Emperor*.

4. ('27) 14 A. I. R. 1927 All. 97 : 49 All. 247 : 98 I. C. 593, *Emperor v. Ram Sarup*.

Court of Calcutta, viz., I.L.R. (1237) 1 Cal. 464,⁵ in which it was held that after disposal of a criminal appeal the High Court is *functus officio* and has no seisin of the case, and cannot grant bail to a convicted person before leave to appeal has been granted by His Majesty in Council. The decisions in 24 Mad. 161¹ and 49 ALL. 247⁴ were distinguished on the ground that they were decisions given on the footing that leave to appeal had been or would be obtained. The application for bail had been refused by the High Court of Calcutta, who gave their reasons at a later date. Cunliffe J. in his judgment mentions the fact that in the interval a suspension order had been made by the Local Government under S. 401. Henderson J. (differing from the view expressed in the Allahabad case) was of opinion that S. 561A had no reference to bail, which was a matter specifically provided for by the Code itself. It appears (from the judgment of Blacker J. in a later case) that, special leave to appeal having been subsequently obtained, a Single Bench Judge did in fact grant bail to Babu Lal Chokhani.

In the same year the matter came under the consideration of the High Court of Nagpur in I. L. R. (1937) Nag. 236.⁶ The High Court, on an appeal from an acquittal, had convicted a person charged with an offence under S. 420, Penal Code. He applied for bail pending an application to His Majesty in Council for leave to appeal. It was held that after signing judgment convicting the accused the High Court was *functus officio*, and had thereafter no power to release him on bail unless special leave to appeal was granted. The application was therefore refused "for the present," because no directions had been received from their Lordships of the Privy Council. Bose J. who delivered the judgment of the Court, repudiated the idea of the High Court possessing any inherent jurisdiction to grant bail. The question of bail had been expressly dealt with by the Code, "and although the matter of bail pending an appeal to the Judicial Committee is not there, its provisions on the subject must be regarded as exhaustive."

Finally in 1937 an application for bail was made to the High Court of Lahore by a convicted person who had obtained special leave to appeal from His Majesty in Council; but no direction had been given as to applying for bail to the High Court. It was decided that once the High Court had passed orders in a criminal appeal it was *functus officio* and had no seisin of the case, but that the seisin

might be revived when the Judicial Committee gave leave to appeal and directed the High Court. Blacker J. in delivering judgment said that he had no power to grant bail because in granting leave to appeal the Judicial Committee had given no direction to apply to the High Court for bail. He dismissed the application but stated :

"It can in my opinion be revived if the petitioner obtains and produces any direction from their Lordships of the Privy Council in the matter which would authorize this Court to go into the question of bail."

In the present case, the appellants' application to be released on bail pending the decision of their appeal to His Majesty in Council was dismissed by the High Court of Lahore (following the last mentioned case) on the ground that their Lordships had given no "direction to the High Court to entertain an application for bail."

From this review of the authorities in India, it would appear that the various views which have prevailed may be summarised thus : (1) if leave to appeal has been obtained from His Majesty in Council and the Judicial Committee has said that an application for bail must be dealt with by the High Court the High Court will have power under S. 498, of the Code to release a convicted person on bail pending the hearing of the appeal; (2) the High Court has an inherent power to do so if special leave to appeal has been obtained from His Majesty in Council; (3) the High Court possesses no inherent power as regards bail, (4) after disposal of a criminal appeal by the High Court it is *functus officio*, has no longer any seisin of the case, and cannot grant bail to a convicted person unless special leave to appeal has been obtained from His Majesty in Council; (5) in addition there must also be a direction received from "their Lordships of the Privy Council"; (6) the High Court's seisin of a criminal case, and its power to grant bail under S. 498 of the Code, is revived when the Judicial Committee gives leave to appeal and directs the High Court. Their Lordships are unable to recognise any proceeding or conduct on their part in the past which can be properly described as a "direction to a High Court to entertain an application for bail." When any suggestion of bail has been mooted on behalf of a successful petitioner for special leave to appeal against his conviction, their Lordships have always refused to consider the matter, and have no doubt at times said that the question of bail could only be properly and satisfactorily dealt with in India. But they have never given any formal direction to a High Court on the matter, nor has any reference to bail been made in Orders in Council granting leave to appeal.

5. ('36) 23 A.I.R. 1936 Cal. 809 : I.L.R. (1937) 1 Cal. 464; 166 I.C. 612, Babu Lal Chokhani v. Emperor.

6. ('37) 24 A. I. R. 1937 Nag. 181 : I. L. R. (1937) Nag. 236; 167 I. C. 373, Bashiruddin v. Emperor.

Moreover, their Lordships find it impossible to appreciate how any suggestion or direction by them in regard to an application for bail to the High Court, made or given when they decide to advise His Majesty that special leave to appeal from a sentence or conviction should be granted, can in any way determine or affect the question under consideration on this appeal. The High Court either does possess power to grant bail in the given circumstances or it does not. If it possesses the power it possesses it independently of any suggestion or direction made or given by their Lordships. If it does not possess it, no suggestion or direction made or given by their Lordships could confer such a power. So far as any decision in India is based upon the fact that such a suggestion was made or direction given, or that no such suggestion was made or direction given, it cannot be supported on that ground alone.

There remains for consideration the question whether the alleged existence of a power in a High Court to grant bail in the stated circumstances can be established on other grounds. If it exists, it must be either because it was conferred on the High Courts by the Code, or because it is one of those inherent powers which are referred to in S. 561A of the Code. So far as the provisions of the Code are concerned, their Lordships can discover nothing therein to justify the view that any such power is thereby conferred on a High Court. The question of bail is dealt with in Part 9 of the Code ("Supplementary Provisions") under Chap. 39 which is entitled "Of Bail." The only granting of bail which is referred to in that chapter (which consists of Ss. 496 to 502 inclusive) is the granting of bail to accused persons. There is no reference therein to the granting of bail to persons who have been tried and convicted. It is true that in the Indian decisions, S. 498 seems to have been treated as though it included cases in which persons already convicted were concerned; but any such view seems to their Lordships to be a misapprehension based upon a mistaken reading of a few words which occur in that section. The section runs thus:

"498. The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police-officer or Magistrate be reduced."

Two things must be observed in relation to this section. The only bonds "executed under this chapter" are executed by persons who are accused (not convicted) persons; and the words "whether there be an appeal on conviction or not" merely qualify or relate to the words "in

any case," and only mean that all accused persons are within the section whether their case is appealable on conviction or not. In truth the scheme of Chap. 39 is that Ss. 496 and 497 provide for the granting of bail to accused persons before trial, and the other sections of the chapter deal with matters ancillary or subsidiary to that provision. The only provision in the Code which refers to the grant of bail to a convicted person is to be found in S. 426. Section 426 forms part of Chap. 31 of the Code which is entitled "Of Appeals" and is included in Part 7 of the Code ("Of Appeal, Reference and Revision"). The section is in these terms:

426. (1) Pending any appeal by a convicted person, the appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

(2) The power conferred by this section on an appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

A consideration of S. 426 reinforces the view that S. 498 has no reference to convicted persons; for, if they were covered by S. 498, it would confer upon the Court of Session a power to grant bail to a convicted person appealing to the High Court, a power which under S. 426 is confined to the High Court. Their Lordships feel no doubt that the Code confers no power on a High Court to grant bail in the case of a convicted person, and the fact that he has obtained leave from His Majesty in Council to appeal from his conviction or sentence makes no difference in this regard.

If such a power exists in a High Court it can only be as a power inherent in a High Court, because it is a power which is necessary to secure the ends of justice. It must be observed that, as decided by Hallett J., after a careful and exhaustive review of the authorities, that no such inherent power exists in the High Court of Justice in this country: (1944) 1 K. B. 532.⁷ In a case (reported only in the "Weekly Notes") Branson J. appears to have made an order granting bail to a prisoner (in this country) who had been sentenced to six months' imprisonment in Cyprus but had been given leave by His Majesty in Council to appeal: (1932) W. N. 272.⁸ The order, however, seems to have been made with the consent of the Secretaries of State for Home Affairs and for the Colonies

7. (1944) 1 K. B. 532, Ex parte Blyth.

8. (1932) 74 L. J. M. C. 440: 1932 W. N. 272, Sutton v. Reg.

and cannot be relied upon as any authority for the view that a Judge of the High Court has any inherent power to grant bail in the circumstances indicated. When such power exists it is statutory. It is perhaps conceivable that such an inherent power might exist in the High Courts in India, but historically it would seem unlikely in view of the provision found in the early Charters, which confer powers on the Judges in India by reference to the powers of the Justices of the King's Bench in England in terms such as the following:

"and to have such jurisdiction and authority as Our Justices of Our Court of King's Bench have and may lawfully exercise within that part of Great Britain called England, as far as circumstances will admit."

Section 561A of the Code confers no powers. It merely safeguards all existing inherent powers possessed by a High Court necessary (among other purposes) to secure the ends of justice. But other difficulties exist in the way of establishing that any such inherent power exists in a High Court. A power to grant bail to convicted persons would, if exercised, interrupt the serving of the sentence; the period of bail might even cover the whole of its term. A power to grant bail would not include a power to exclude the period of bail from the term of the sentence: that this is so is shown by the fact that it was necessary to enact the special provision which is contained in sub-s. (3) of S. 426 of the Code. Under these conditions, the exercise of a power to grant bail would, in the event of the appeal being unsuccessful, result in defeating the ends of justice. Moreover, in the same event it would result in an alteration by the High Court of its judgment, which is prohibited by S. 369 of the Code. Finally their Lordships take the view that Chap. 39 of the Code together with S. 426 is, and was intended to contain a complete and exhaustive statement of the powers of a High Court in India to grant bail, and excludes the existence of any additional inherent power in a High Court relating to the subject of bail. They find themselves in agreement with the views expressed by Richardson J. Henderson J. and Bose J. in the three cases referred to earlier in this judgment.

It may well be that the case of an appeal from a High Court to His Majesty in Council was not within the contemplation of the framers of the Code. It may well be that a power to grant bail in such a case would be a proper and useful power to vest in a High Court. Their Lordships fully appreciate the propriety and utility of such a power, exercisable by Judges acquainted with the relevant facts of each case, and (if exercised) with power to order that the bail period be excluded

from the term of any sentence. But in their Lordships' opinion this desirable object can only be achieved by legislation. In the meantime there is a section of the Code to which, pending legislation, recourse may be had, and by means of which the ends of justice may be secured, viz., S. 401 which enables the Provincial Government to "suspend" the execution of a sentence. As hereinbefore appears recourse has been had to this section on previous occasions. For the reasons indicated, their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed. In view of the general importance of the question which has been raised and decided their Lordships make no order as to the costs of this appeal.

Appeal dismissed.

R.K.

Solicitors for Appellants—*Hy. S. L. Polak & Co.*
Solicitors of Respondents—*Solicitor, India Office.*

A. I. R. (32) 1945 Privy Council 98

(From Federal Court :

('43) 30 A.I.R. 1943 F. C. 11)

21st January 1945

LORDS RUSSELL OF KILLOWEN, PORTER,
SIMONDS AND GODDARD, AND
SIR MADHAVAN NAIR.

Governor-General in Council

v.

Province of Madras.

Privy Council Appeal No. 14 of 1944; Federal Court Appeal No. 1 of 1943.

(a) Government of India Act (1935), Sch. 7, Lists I, II and III—Not name but real nature of tax is determining factor.

It is not the name of the tax but its real nature, its "pith and substance" as it has sometimes been said, which must determine into what category it falls. [P 99 C 2]

(b) Government of India Act (1935), Sch. 7, Lists I and II — If no fair reconciliation, former prevails.

If the legislative powers of the Federal and Provincial Legislatures, which are enumerated in List I and List II of Sch. 7, cannot fairly be reconciled, the latter must give way to the former. [P 100 C 2]

(c) Government of India Act (1935), Sch. 7, List I, No. 45—"Excise" explained.

A duty of excise is primarily a duty levied upon a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax upon goods not upon sales or the proceeds of sale of goods. ('42) 29 A.I.R. 1942 F. C. 33, *Rel. on.* [P 101 C 2]

(d) Madras General Sales Tax Act (9 of 1939)—Act is not ultra vires Provincial Legislature.

Entries No. 45 of the Federal List and No. 48 of the Provincial List can fairly be reconciled, and hence the validity of the Madras Act (9 of 1939) cannot successfully be challenged. [P 101 C 2]

Sir W. Monckton and B. J. McKenna —
for Appellant.

J. M. Tucker and H. G. Robertson —
for Respondent.

Lord Simonds.—This appeal is brought by the Governor-General in Council from a decree made by the Federal Court of India in its original jurisdiction on 17th March 1942. In proceedings commenced in that Court against the respondent, the Province of Madras, the appellant claimed that the Madras Act, 9 of 1939, known as the Madras General Sales Tax Act of 1939 and hereafter referred to as "the Madras Act," in so far as it purports to levy a tax on first sales in Madras of goods manufactured or produced in India is, except in respect of certain excepted goods, ultra vires and beyond the competence of the Legislature of the respondent. The Federal Court dismissed the appellant's suit following its previous decision in an appeal from the High Court of Madras in a suit in which the present respondents were appellants and a firm called Boddu Paidanna and Sons were respondents and the validity of the same provisions of the same Act was in issue. This case will be referred to as the *Boddu Paidanna case*.¹

The legislative powers of the Federal and Provincial Legislatures respectively are defined in the Government of India Act, 1935, sometimes called "The Constitution Act," and it will be convenient to refer to them before examining the provisions of the impugned Madras Act.

Section 100, Constitution Act, provides as follows:

"(1) Notwithstanding anything in the two next succeeding sub-sections the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in Sch. 7 to this Act (hereinafter called the 'Federal Legislation List')."

(2) Notwithstanding anything in the next succeeding sub-sections the Federal Legislature, and, subject to the preceding subsection, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the 'Concurrent Legislative List')."

"(3) Subject to the two preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the 'Provincial Legislative List.')"

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof."

Entry No. 45 of the Federal Legislative List is as follows:

"45. Duties of excise on Tobacco and other goods manufactured or produced in India except [there follow certain exceptions]."

Entry No. 48 of the Provincial Legislative List is as follows:

"48. Taxes on the sale of goods and on advertisements."

It is upon these two entries respectively that the parties rely, the respondent contending that Entry No. 48 of the Provincial Legislative List authorises and justifies the impugned provisions of the Madras Act, the appellant contending that so far as those provisions purport to impose a tax on first sales they in effect impose a duty of excise and are therefore an encroachment upon the power given exclusively to the Federal Legislature by Entry No. 45 of the Federal Legislative List. Before further considering the provisions of the Constitution Act it will be convenient to examine somewhat closely the Madras Act. For in a Federal constitution, in which there is a division of legislative powers between Central and Provincial Legislatures, it appears to be inevitable that controversy should arise whether one or other Legislature is not exceeding its own, and encroaching on the other's, constitutional legislative power, and in such a controversy it is a principle, which their Lordships do not hesitate to apply in the present case, that it is not the name of the tax but its real nature, its "pith and substance" as it has sometimes been said, which must determine into what category it falls.

The Madras Act which received the assent of the Governor of Madras on 4th June 1939, is entitled "An Act to provide for the levy of a general tax on the sale of goods in the Province of Madras." Its preamble recites that it is expedient to provide for the levy of a general tax on the sale of goods in the Province of Madras. By s. 1 it is provided that this Act may be called "The Madras General Sales Tax Act, 1939," and that it is to extend to the whole of the Province of Madras. The rest of the Act does not bely its title or its declared purpose. Section 2 contains a number of definitions of which it is necessary to refer only to the following:

"(b) 'dealer' means any person who carries on the business of buying or selling goods.

(h) 'sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration but does not include a mortgage hypothecation charge or pledge.

(i) 'Turnover' means the aggregate amount for which goods are either bought or sold by a dealer whether for cash or for deferred payment or other valuable consideration provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover.

1. Reported in ('42) 29 A.I.R. 1942 F. C. 33 : I. L. R. (1942) Kar. F. C. 72 : 1942 F.C.R. 90 : 200 I. C. 551 (F.C.), Province of Madras v. Boddu Paidanna & Sons.

"*Explanation.*—Subject to such conditions and restrictions, if any, as may be prescribed in this behalf:

'(i) the amount for which goods are sold shall include any sums charged for anything done by the dealer in respect of the goods sold at the time of or before the delivery thereof ;

'(ii) any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers shall not be included in the turnover.

'(iii) where for accommodating a particular customer a dealer obtains goods from another dealer and immediately disposes of the same to the said customer, the sale in respect of such goods shall be included in the turnover of the latter dealer but not in that of the former'."

Section 3, the taxing section, provides as follows:

"3 (1) Subject to the provisions of this Act, every dealer shall pay in each year a tax in accordance with the scale specified below : (a) If his turnover does not exceed 20,000 rupees. 5 rupees per month. (b) if his turnover exceeds 20,000 rupees, one half of one per cent. of such turnover. Provided that any dealer whose turnover in any year is less than 10,000 rupees shall not be liable to pay the tax under this sub-section for that year :

Provided further (1) that in respect of the same transaction of sale, the buyer and the sellers shall not both be taxed but only one of them, as shall be determined by the rules made in this behalf under sub-s. (2) shall be taxed thereon and (2) that when the amount for which any goods were bought by a dealer has been included in his turnover the amount for which the same goods were sold by him shall not be included in his turnover for the purposes of this Act."

(2) The turnover for all the purposes of this Act shall be determined in accordance with, and the tax shall be assessed, levied and collected in such manner and in such instalment as may be prescribed by the Rules made by the Provincial Government in this behalf.

(3) Subject to any rules made under sub-s. (2) the assessing authority may fix the turnover of any dealer in any year at the amount of his turnover in the previous year."

Sections 4 and 5 provide for exemption from the tax imposed by S. 3 of certain classes of goods and S. 6 for taxation of the sale of hides and skins whether tanned or untanned only at such single point in the series of sales by successive dealers as might be prescribed. Section 7 provides for a rebate of one-half of the tax levied on sales of certain goods for delivery outside the Province, S. 8 for the licensing and exemption of agents. Other sections provide the necessary administrative machinery for the assessment and collection of a tax on sales. Section 19 provides that the Provincial Government may make rules to carry out the purposes of the Act.

Under S. 3 (2) of the Madras Act, the Provincial Government made rules which are called "The Madras General Sales Tax (Turnover and Assessment) Rules, 1939" and under S. 19 further rules which are called "The Madras General Sales Tax Rules, 1939." To

these rules which are of an elaborate and comprehensive character it is unnecessary to refer except to note that under Rule 4 (1) of the first-mentioned rules the gross turnover of a dealer for the purposes of the rules is to be the amount for which the goods are sold by him except that under Rule 4 (2) in the case of certain goods therein enumerated the gross turnover is to be the amount for which the goods are bought. Their Lordships have thought it desirable to refer to the provisions of the Madras Act in this detail in order to emphasise its essential character. Its real nature, its "pith and substance," is that it imposes a tax on the sale of goods. No other succinct description could be given of it except that it is a "tax on the sale of goods." It is in fact a tax which according to the ordinary canons of interpretation appears to fall precisely within Entry No. 48 of the Provincial Legislative List.

It is necessary then to consider the contention, which in the *Boddu Paidanna case*¹ found favour with the High Court of Madras, that the Madras Act so far as it imposes a tax on first sales of goods manufactured or produced in India is ultra vires the Provincial Legislature. This contention is thus clearly stated in the appellant's formal reasons on the present appeal: (1) a tax on the manufacturer or producer of goods on the first sale thereof is a duty of excise, (2) under the provisions of the Constitution Act the appellant has, and the respondent has not, power to impose a duty of excise, (3) the provisions of Entry No. 48 in the Provincial Legislative List must be construed subject to the provisions of Entry No. 45 in the Federal Legislative List. The third reason thus stated rests on the opening words of S. 100 (1), Constitution Act, "Notwithstanding anything in the two next succeeding sub-sections" and the opening words of S. 100 (3) "subject to the two preceding sub-sections." Their Lordships do not doubt that the effect of these words is that, if the legislative powers of the Federal and Provincial Legislatures, which are enumerated in List 1 and List 2 of Sch. 7, cannot fairly be reconciled, the latter must give way to the former. But it appears to them that it is right first to consider whether a fair reconciliation cannot be effected by giving to the language of the Federal Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it, and equally giving to the language of the Provincial Legislative List a meaning which it can properly bear. In this connexion it must in the first place be observed that the contention of the appellant involves doing violence to the language

of Entry No. 48 of the Provincial Legislative List. For if his contention is upheld, the plain words "Taxes on the sale of goods" must be read as if the words "other than the first sale of goods manufactured or produced in India" were added by way of qualification. Bearing in mind first that the problem of the division of taxing power in a Federal Constitution was in general no new one and that the framers of the constitution must in particular have been well aware of the controversies that had arisen in regard to "excise" and taxes on first or other sales, and, secondly, that the contention of the appellant would remove from the range of Provincial taxation goods which had not been in the past, nor were likely in the future to be, the subject of an excise duty, their Lordships would be reluctant to adopt such a construction if any other was fairly open to them. The validity of the appellant's first reason must therefore be examined in order to see whether the Lists can be reconciled not by doing violence to the language of the Provincial List but by giving some other than the meaning and effect, for which the appellant contends, to the relevant words of the Federal List.

Their Lordships would first observe (concurring herein in the cogent reasoning of the Federal Court in the *Boddu Paidanna case*¹) that little assistance is to be derived from the consideration of other Federal Constitutions and of their judicial interpretation. Here there is no question of direct and indirect taxation nor of the definition of specific and residuary powers. The Indian constitution is unlike any that have been called to their Lordships' notice in that it contains what purports to be an exhaustive enumeration and division of legislative powers between the Federal and Provincial Legislatures. Where there is such an enumeration, the language of the one list may be coloured or qualified by that of the other. The problem is different when on the one hand there are specific, and on the other residuary, powers.

The appellant's fundamental contention is that the power to impose a duty of excise, which is given to the Federal Legislature alone by Entry No. 45 of the Federal List, entitles that Legislature and no other to impose a tax on first sales of goods manufactured or produced in India. No other meaning, it is contended, can fairly be given to the words "duty of excise" than one which includes a tax on the first sales of such goods. If such a construction involves that violence must be done to the plain meaning of Entry No. 48 of the Provincial List, that, it is said, is contemplated and safeguarded by the opening words of section 100 (1).

To their Lordships this contention does not appear well-founded. The term "duty of excise" is a somewhat flexible one: it may, no doubt, cover a tax on first and perhaps on other sales: it may in a proper context have an even wider meaning. An exhaustive discussion of this subject, from which their Lordships have obtained valuable assistance, is to be found in the judgment of the Federal Court in 1939 F. C. R. 18.² Consistently with this decision, their Lordships are of opinion that a duty of excise is primarily a duty levied upon a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax upon goods not upon sales or the proceeds of sale of goods. Here again their Lordships find themselves in complete accord with the reasoning and conclusions of the Federal Court in the *Boddu Paidanna case*.¹ The two taxes, the one levied upon a manufacturer in respect of his goods, the other upon a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the exciseable article leaves the factory or workshop for the first time upon the occasion of its sale. But that method of collecting the tax is an accident of administration: it is not of the essence of the duty of excise which is attracted by the manufacture itself. That this is so is clearly exemplified in those excepted cases in which the Provincial, not the Federal, Legislature has power to impose a duty of excise. In such cases there appears to be no reason why the Provincial Legislature should not impose a duty of excise in respect of the commodity manufactured and then a tax on first or other sales of the same commodity. Whether or not such a course is followed appears to be merely a matter of administrative convenience. So by parity of reasoning may the Federal Legislature impose a duty of excise upon the manufacture of exciseable goods and the Provincial Legislature impose a tax upon the sale of the same goods when manufactured.

It appears then to their Lordships that the competing Entries No. 45 of the Federal List and No. 48 of the Provincial List may fairly be reconciled without adopting the contention of the appellant, and that the validity of the Madras Act cannot successfully be challenged. Their Lordships would again emphasise that in coming to this conclusion they have regarded

2. (1939) 26 A. I. R. 1939 F. C. 1 : I. L. R. (1939) Kar. F. C. 6 : 1939 F. C. R. 18 (F. C.), In re the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act No. 14 of 1938.

substance not form. The tax imposed by the Madras Act is not a duty of excise in the cloak of a tax on sales. Lacking the characteristic features of a duty of excise such as uniformity of incidence and discrimination in subject-matter, it is in its general scope and in its detailed provisions a "tax on sales." Their Lordships must not be taken as expressing any view upon the validity of any measure upon the substance of which a different opinion might be formed. For the reasons already stated, their Lordships are of opinion that this appeal must be dismissed and they will humbly advise His Majesty accordingly.

R.K.

*Appeal dismissed.*Solicitors for Appellant—*Solicitor, India Office.*Solicitors for Respondent—*E. F. Turner & Sons.***A. I. R. (32) 1945 Privy Council 102***(From Patna)*

19th March 1945

LORDS THANKERTON, MACMILLAN AND
SIMONDS, SIR MADHAVAN NAIR AND
SIR JOHN BEAUMONT

*Veeradhi Birabar Sri Pratapa Ram-
chandra Ananga Bhima Deo Kesri
Gajapati — Appellant*

v.

Sri Chakrapani Deo — Respondent.

Privy Council Appeal No. 42 of 1942; Patna
Appeal No. 2 of 1941.

Custom—Orissa zamindari—Personal savings
of zamindar do not become accretions to estate.

There is no custom among the Oriya zamindars
in general, and in the Bodokhemidi estate in parti-
cular, that the personal savings of the zamindar
become accretions to the impartible estate upon his
death. [P 102 C 2; P 103 C 1]

Sir T. Strangman and C. Bagram —

for Appellant.

R. Ritson — for Respondent.

Sir John Beaumont.—This is an appeal from an appellate judgment and decree of the High Court of Judicature at Patna, dated 21st December 1940, which modified, in favour of the appellant, a judgment and decree of the District Judge of Gamjam-Puri dated 17th March 1937. The appellant is the natural son and heir of his father, who was a Khetriya by caste and the owner of an impartible estate in Orissa known as the Bodokhemidi Estate. The respondent is the illegitimate son of the appellant's father by a regularly kept concubine, and the question raised in the suit is as to the respondent's right to maintenance out of his father's estate. The respondent's mother died a few days after his birth, and the respondent was brought up under the care of a foster-mother. By an order of the late zamindar dated 5th May 1917, the respondent was given the income of 40 acres of land for his

maintenance. It appears that he was given also a monthly allowance of Rs. 43-8-0 for pocket money, personal servants, and domestic expenses, but that out of the 40 acres of land the income of 10 acres was given to the foster-mother. After the death of the late zamindar, the estate came under the management of the Court of Wards, the appellant being then a minor, and remained under such management until 1st December 1930, when it was handed to the appellant. By an order of the Court of Wards dated 29th September 1923, the respondent was given a cash allowance of Rs. 100 monthly in lieu of the allowances he had received during the lifetime of his father, and he continued to receive this allowance until 1st December 1930, when the estate was handed to the appellant. When the appellant took over charge of the estate he discontinued the allowance to the respondent, and denied the right of the respondent to receive any allowance whatsoever. Accordingly, on 31st July 1933, the respondent instituted this suit claiming maintenance past and future. The only question which has been argued before their Lordships' Board was that raised in issue 5 in the trial Court, which was in these terms:

"Is there any custom among the Oriya Zamindars in general, and the defendant's family in particular, that the personal savings of the zamindar become accretions to the impartible estate upon his death?"

The trial Judge answered this issue in the following terms:

"No such custom has been proved, nor has any attempt been made to prove it. I find this issue in the negative."

Having regard to his findings on this and the other issues, the learned Judge awarded to the respondent maintenance at the rate of Rs. 250 a month, and directed that the maintenance be made a charge on the properties described in the plaint schedule. On appeal to the High Court, the only question raised appears to have been as to the quantum of the maintenance, which the Court reduced from Rs. 250 a month to Rs. 150 a month. In other respects the decree of the lower Court was upheld. Before their Lordships' Board it has been contended by the appellant that the learned trial Judge failed to consider the evidence led by the appellant upon issue 5. It is true that the learned Judge was in error in saying that no attempt was made to prove the alleged custom. The Ruling Chief of Seraikella was examined on commission, and he stated that the savings and the accretions of the holder of an impartible estate in Orissa either moveable or immovable went to his successor. But the examples cited by the witness in support of his opinion are derived from Indian States, and districts outside Orissa, where the customs may, or may not, be the same as those

affecting zamindari estates in Orissa. Their Lordships agree that the custom relied upon is not proved. This is sufficient to dispose of the appeal, but their Lordships would add that they are by no means satisfied that, even if the custom were proved, it would dispose of the respondent's claim, regard being had to the manner in which the late zamindar and the Court of Wards dealt with the respondent, and to the lack of satisfactory evidence as to the property out of which his allowances were provided. However, their Lordships need not discuss this aspect of the matter, nor need they deal with the question, expressly left open by the High Court, whether an illegitimate son can be maintained out of an impartible estate. Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of the appeal.

R.K. *Appeal dismissed.*

Solicitors for Appellant — *Hy. S. L. Polak & Co.*
Solicitors for Respondent — *Douglas Grant & Dold.*

A. I. R. (32) 1945 Privy Council 103

(*From Oudh : ('42) 29 A. I. R. 1942 Oudh 381*)

19th March 1945

LORD THANKERTON, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT

Kunwar Rajendra Bahadur Singh — Appellant

v,

Mr. Justice Kunwar Dalip Singh — Respondent.

Privy Council Appeal No. 7 of 1944 ; Oudh Appeal No. 16 of 1942.

(a) U. P. Encumbered Estates Act (25 of 1934, as amended in 1939), S. 14—"Contract made in course of transaction," explained.

A contract for a mortgage is usually preceded by negotiations in which the amount to be advanced, rate of interest, and the nature of the security are arranged, and when such negotiations result in a mortgage contract the contract can be correctly described as made in the course of the transaction : ('39) 26 A. I. R. 1939 Oudh 110, *doubted and not approved.* [P 105 C 1]

(b) U. P. Encumbered Estates Act (25 of 1934, prior to amendment of 1939), S. 14 — Interest.

The Act of 1934 was silent as to interest converted into principal on 31st December 1916, and there was nothing in the Act to prevent effect being given to the contract between the parties as to such interest. [P 105 C 1]

J. M. Parikh and R. Parikh — for Appellant.

Sir H. Cunliffe and L. M. Jopling — for Respondent.

Sir John Beaumont. — This is an appeal from a judgment and decree dated 13th April 1942, of the Chief Court of Oudh at Lucknow, which modified a judgment and decree dated 25th May 1938, as amended by a judgment and

decree dated 9th May 1940, of the Special Judge, First Grade, Barabanki, under the United Provinces Encumbered Estates Act, 1934 (hereinafter referred to as "the 1934 Act"). The questions raised in the appeal relate to the construction and effect of the 1934 Act as amended by the United Provinces Encumbered Estates Amendment Act, 1939 (hereinafter called "the 1939 Act"). The facts giving rise to the appeal are not in dispute.

On 23rd January 1912, Raja Raghuraj Bahadur Singh borrowed Rs. 5,00,000 from Raja Sir Harnam Singh, carrying interest compoundable half-yearly on the terms of a mortgage deed. On 20th October 1915, Raja Raghuraj Bahadur Singh executed a fresh mortgage (hereinafter referred to as "the mortgage of 1915") in favour of Raja Sir Harnam Singh, in substitution for the mortgage of 1912 for securing Rs. 5,71,490-18-9 carrying interest at 6 per cent. per annum payable on 30th June and 31st December in each year, with a provision that if any half-yearly instalment of interest was not paid on the due date it should be added to principal and carry interest at the rate of 6 per cent. per annum. The rate of interest was subsequently raised, but nothing turns upon this. On 8th January 1926, Raja Sir Harnam Singh obtained a preliminary decree on the mortgage of 1915 which decree was made final on 26th February 1927. In the year 1925, the mortgagor having died, his sons divided the estate and liabilities between themselves. One of the brothers paid off his share of the mortgage debt under the mortgage of 1915, and on 17th October 1929, the other son, namely the appellant, Kunwar Rajendra Bahadur Singh, executed a fresh mortgage (hereinafter referred to as "the mortgage of 1929") in favour of Raja Sir Harnam Singh to secure the appellant's share of the mortgage debt amounting to Rs. 7,60,108-11-9. Interest was to be payable at the rate of 7 per cent. per annum and there was a provision for capitalising interest in arrear similar to that in the mortgage of 1915. In February 1935, a decree for sale was made of the property comprised in the last mentioned mortgage.

In April 1935, the Act of 1934 came into operation. By S. 4, the right is given to any landlord who, or whose immovable property, is encumbered by private debts, to make an application to the Collector of the District requesting that the provisions of the Act be applied to him. The Collector is required to forward the application to the Special Judge appointed under the Act. Section 14 provides for the hearing of the application by the Special Judge. Sub-sections (4) (a), (5) and (6) are in the following terms :

"(4) In examining each claim the Special Judge shall have and exercise all the powers of the Court in which a suit for the recovery of money due would lie and shall decide the questions in issue on the same principles as those on which such Court would decide them, subject to the following provisions namely :

(a) the amount of interest held to be due on the date of application shall not exceed that portion of the principal which may still be found to be due on the date of application.

(5) For the purpose of ascertaining the principal under cl. (a) of sub-s. (4) the Special Judge shall treat as principal any accumulated interest which has been converted into principal at any statement or settlement of account, or by any contract made in the course of the transaction before 31st December 1916.

(6) For the purpose of ascertaining the principal under cl. (a) of sub-s. (4) the Special Judge shall not treat as principal any accumulated interest which has been converted into principal at any statement or settlement of accounts or by any contract made in the course of the transaction after 31st December 1916."

The effect of the Act seems to be that the Special Judge has to ascertain the principal sum due at the date of the application and, in so doing, disallow all interest capitalised, at any rate, after 31st December 1916. Once the principal sum has been so ascertained, it follows that the balance of the amount due, so far as the whole debt consists of capital and interest, and excluding other sums which may be due, e.g., for costs, charges and expenses, is attributable to interest, of which the amount recoverable is limited to a sum equal to the principal. On 30th October 1936, application under the Act was duly made and it is not contended that such application was out of time. The Special Judge determined the application on 25th May 1938. He held that of the amount secured by the mortgage of 1929, the principal sum comprised in the mortgage of 1915 represented principal and the balance interest. He then apportioned the principal sum between the present appellant and his brother in the proportions in which they had divided the liability under the mortgage of 1915 between them and on that basis he fixed the principal due by the appellant at Rs. 3,45,291-8-9, and held that the appellant was liable for payment of that sum for principal and a further sum of the same amount for interest. He also allowed certain sums for costs and fixed the total amount for which the appellant was liable at Rs. 7,02,140-8-6. On 29th September 1938, the appellant presented a memorandum of appeal to the Chief Court of Oudh against this decision but, before the appeal came on for hearing, the Act of 1939 was passed on 30th September 1939. That Act provided, in S. 14, that in S. 14 of the 1934 Act, for the words and figures "before December 31st, 1916" in sub-s. (5) the words and figures "on or before December 31st, 1916"

should be substituted, and an explanation was added to sub-s. (5) in these terms :

"Interest which on or before 31st December 1916, became part of the principal under the express terms of the original contract shall, for the purpose of this section, be deemed to be principal."

By S. 22 a new section, No. 20A, was added after S. 20 of the 1934 Act which so far as material provided, that notwithstanding anything in the 1934 Act, if in the determination of any claim under the provisions of S. 14 any interest had not been treated as principal solely on the ground that it was converted into principal on 31st December 1916, or on the ground that it was converted into principal on or before 31st December 1916, in accordance with an express term in the original contract the amount due under such claim should be re-determined in accordance with the provisions of the Act. The reason for the insertion of the explanation to S. 14, sub-s. (5) of the 1934 Act would seem to have been that the Chief Court of Oudh, in 14 Luck. 430¹ had decided that the contract referred to in sub-s. (5) was a contract entered into after the original mortgage and did not include a provision for converting interest into principal contained in the original mortgage. This case will be considered later in this judgment.

On 9th May 1940, an application was made under S. 20A, sub-cl. 4 of the 1939 Act to re-open the decision of the Special Judge of 25th May 1938. The application came before another Special Judge who added to the principal sum allowed by his predecessor unpaid interest which became payable between the date of the 1915 mortgage and 31st December 1916, and held that the amount to which the claimant mortgagees were entitled was Rs. 7,37,715-12-6. In fixing this amount, the learned Judge, apparently by inadvertence, omitted to include the costs allowed by his predecessor.

The appeal to the Chief Court against the order of 25th May 1936, came on for hearing on 13th April 1942, and was treated as an appeal both against the order of 25th May 1938, and the order of re-determination of 9th May 1940. The appeal was dismissed, and cross objections asking for the costs allowed at the first hearing and omitted by inadvertence on the re-determination were allowed. In dismissing the appeal, the learned Judges of the Chief Court expressed the view that the principal sum allowed by the first Special Judge was at too low a figure. Their Lordships have felt some difficulty in following the views of the learned Judges of the Chief Court upon this point, but as there was no appeal against the amount at which the principal

1. (39) 26 A. I. R. 1939 Oudh 110 : 14 Luck. 430 : 179 I. C. 925, *Sundar Lal v. Kaniz Zohra Begum*.

sum had been fixed by the Special Judge the observations were unnecessary for the determination of the appeal and need not be further considered.

On this appeal the only point which has been seriously argued is that the amendments to the 1934 Act made by the 1939 Act are ultra vires in so far as they are retrospective, by reason of the provisions of S. 292, Government of India Act, 1935. That section provides :

"Notwithstanding the repeal by this Act of the Government of India Act, 1915, but subject to the other provisions of this Act all the law in force in British India immediately before the commencement of Part 3 of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority."

The argument is that if a law be altered retrospectively it has, in effect, not continued in force until altered by a competent Legislature. Their Lordships find it unnecessary to determine this question because, in their view, retrospective provisions of the 1939 Act have no effect on the rights of the parties to this litigation. In their Lordships' view the case in 14 Luck. 430¹ is open to serious criticism. The Court in that case discussed with some precision the meaning of the word "course" in the expression "in a contract made in the course of the transaction" but they did not discuss the meaning of the word "transaction" and assumed it to refer only to the ultimate written contract. A contract for a mortgage is usually preceded by negotiations in which the amount to be advanced, rate of interest, and the nature of the security are arranged, and their Lordships think that when such negotiations result in a mortgage contract the contract can be correctly described as made in the course of the transaction. But however that may be, in the present case, the mortgage transaction unquestionably commenced in 1912 when the original mortgage was entered into for which the mortgage of 1915 was substituted. It seems to their Lordships clear that the mortgage of 1915 was a contract made in the course of the transaction within the meaning of S. 14 (5) of the 1934 Act and the first Special Judge was in error in not allowing capitalised interest under the mortgage of 1915 down to and including 31st December 1916. It may be noticed that the Act of 1934 was silent as to interest converted into principal on 31st December 1916, and there was nothing in the Act to prevent effect being given to the contract between the parties as to such interest. But their Lordships agree with the Chief Court in thinking that the first Special Judge must be treated as having disallowed interest because it had been converted into principal on or before 31st December 1916, in accordance with

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the express term in the original contract, and the matter was therefore rightly re-determined by the second Special Judge under S. 20A of the 1939 Act. For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

R.K.

Appeal dismissed.

Solicitors for Appellant — *Lambert and White.*

Solicitors for Respondent—*Hy. S. L. Polak & Co.*

A. I. R. (32) 1945 Privy Council 105 (*From Calcutta*)

5th February 1945

LORDS THANKERTON, WRIGHT AND
GODDARD, SIR MADHAVAN NAIR
AND SIR JOHN BEAUMONT

Manindra Chandra Lala — Appellant
v.

Mahaluxmi Bank Limited —

Respondent.

Privy Council Appeal No. 9 of 1943; Bengal Appeal No. 4 of 1940.

(a) Will—Finding as to attestation and execution is one of fact.

The finding that execution and attestation of the will was proved is a pure finding of fact.

[P 107 C 1]

C. P. C. —

('44) Chitale, S. 100, N. 28 Pt. 3.

(b) Will—Construction — Testator appointing his brother S as executor and giving power to his wife to adopt son from S—Appointment of S as executor held did not emerge until there was adoption by testator's widow or failing adoption until S's son attained majority.

The testator who had no issues provided in his will that in case of his dying childless his wife should adopt three sons one after another but during the lifetime of one she should not adopt another and that the adopted son shall have to be taken from the testator's brother S and not from anybody else. When a son was taken in adoption he was to be the owner in possession of all the testator's properties. The will further provided : "If no son be taken in adoption then the son of my brother S, shall get all the properties in my share. If a son is taken in adoption, then until the said adopted son attains majority or if no son is taken in adoption then until the son of the said S attains majority, my brother S shall be the executor of this will and shall respectfully provide maintenance to my wife adequately in a manner befitting a respectable lady" :

Held that by the terms of the will the appointment of S as executor did not emerge until there was adoption of a minor son, or, failing an adoption, until S's son attained majority. [P 106 C 2; P 107 C 2]

(c) Will — Delay in applying for probate — Effect of.

Delay in applying for probate naturally gives rise to some suspicion but when the execution and attestation of the will is proved the suspicion no longer operates.

[P 107 C 2]

J. M. Pringle — for Appellant.

Sir H. Cunliffe, J. M. Parikh and R. Parikh
— for Respondent.

Lord Thankerton.—This is an appeal in forma pauperis by special leave from a judg-

ment and decree of the High Court of Judicature at Fort William in Bengal, dated 27th July 1937, which set aside the judgment and decree of the District Judge of Chittagong, dated 20th November 1934, and dismissed the appellant's application for probate of the will of his paternal uncle, Girija Kripa Lala, who died on 1st January 1904. In his application for probate, filed on 9th November 1933, the appellant, as executor, propounds a will dated 30th December 1903, two days before the death of the testator. The District Judge found for the execution and attestation of the will, and the High Court reversed this decision on a pure question of fact. The testator and his younger brother, Saroda, who is the father of the appellant, constituted a joint Hindu family governed by the Dayabhaga school of Hindu law. The testator left a widow, Srimati Bama Sundari, but no issue. At that date, the appellant, who was then two or three years old, was the only son of Saroda, though some years later another son was born to Saroda, who did not survive infancy. It is admitted that on the same 30th December 1903, the testator executed a deed of authority conferring on his widow power to adopt

"three sons successively, one by one, one after the death of another, from among the existing and future sons of my said full brother Saroda."

It is admitted that the testator signed this deed which was written by Srimanta Ram Lala, who had been in the service of the family for many years, and was then its chief clerk, and that it was duly attested by five persons: (1) Ramesh Chandra Sen, a Small Cause Court Judge who died in 1922; (2) Saroda himself; (3) Chandra Mohan Dastidar, the testator's brother-in-law, who died about 1925; (4) Digamber Bhattacharjee, who was a pleader and the testator's family lawyer, who had previously been tutor to Saroda; and (5) the testator's doctor, Dr. Beni Mohan Das. The deed was registered on 5th February by the widow, who was identified by the witness Ishan Chandra Chowdhury. With the exception of Saroda, the names of the scribe and the attesting witnesses appear on the will in the same capacities. The material clauses of the will are as follows:

"(1) I am entitled to a moiety i. e., 8 annas share of the entire 16 annas of my ancestral and self-acquired immovable and moveable properties and of the moneys of the money-lending business etc., and I have been the owner-in-possession in the said manner in Ejmal. My brother Sriman Saroda Kripa Lala has been the owner-in-possession of the remaining 8 annas share.

(2) I have no son or daughter living nor is there any likelihood of my getting any. If I die without any issue my wife Srimati Bama Sundari shall be competent to take in adoption three sons one after another. But during the lifetime of one adopted son she shall not be competent to take another in adop-

tion. If a son has to be taken in adoption, he shall have to be taken from my brother Sriman Saroda Kripa Lala. She shall not be competent to take a son in adoption from anybody else.

(3) When a son has been taken in adoption my adopted son shall be the owner-in-possession of all the properties in my share down to his sons, grandsons, and so on in succession. My wife Srimati Bama Sundari shall live in joint mess with the adopted son and shall enjoy the profits of my estate as a respectable lady. If there arises any misunderstanding with the adopted son then she shall be competent to live anywhere she desires separately and shall be competent, up to the end of her lifetime, to realise from my adopted son an annuity at the rate of Rs. 100 per month either amicably or by law suit making my estate liable for the same.

(4) If no son be taken in adoption then the son of my brother Sreeman Saroda Kripa Lala shall get all the properties in my share. If a son is taken in adoption, then until the said adopted son attains majority or if no son is taken in adoption then until the son of the said, Sriman Saroda Kripa Lala attains majority, my brother Sriman Saroda Kripa Lala shall be the executor of this Will and shall respectfully provide maintenance to my wife, Srimati Bama Sundari adequately in a manner befitting a respectable lady. If he does not so provide, or if my wife does not live in joint mess with them then she shall be competent to realise the said annuity from the executor either amicably or by law suit making my estate liable for the same. When the person entitled to the property mentioned in this Will attains majority, he shall be the executor of this Will.

(5) My wife Srimati Bama Sundari shall not be competent to encumber any portion of the properties left by me in any manner or to make a sale or transfer thereof in any way. She shall only get the maintenance or annuity as aforementioned. To this effect on the above-mentioned terms I execute this Will in full possession of my senses and in sound mind and of my own accord. Finis."

After the death of the testator, his widow took possession of the estate and obtained mutation in her own name in the land registers. She died in 1920 without having exercised her power of adoption, and Saroda took possession of the estate, and obtained mutation in his name. There seems little doubt that the widow and Saroda successively dealt with the estate on the footing that there was no will, and it was during Saroda's possession that the respondent Bank obtained from him rights over the estate, which are now admitted as conferring on it a locus to oppose the appellant's application for probate.

The learned trial Judge found that the will was reasonable, natural and proper in its terms, and that there was no suspicion inherent in it that it did not express the mind of the testator. The learned Judges of the High Court thought otherwise, mainly on the ground of the exclusion of Saroda. Their Lordships agree with the trial Judge. Equally their Lordships are unable to find that any improbability is involved in the execution of both documents; on this point they agree with the reasoning of the trial Judge. With regard to the delay in the application for probate, this

naturally gives rise to some suspicion, especially when taken along with the adverse action of the widow and Saroda, but if the learned trial Judge's finding that the execution and attestation of the will was proved by the evidence he accepted, he is certainly right in saying that the suspicion no longer operates. The finding of the learned Judge as to execution and attestation of the will is a pure finding of fact, but the High Court have reversed it. It is therefore necessary to examine with care the reasons given for this reversal.

In certain circumstances, the present case is unusual. In the first place, the execution on the same day of the deed of authority, which is admittedly genuine, and therefore has genuine signatures of the testator, and of all the attesting witnesses to the will, as also of the writer of both documents, is of importance, as well their being both available for scrutiny by the Courts, including their Lordships. The only witness on this matter for the respondents, Mohim Chandra Guha, gave evidence to the effect that he had seen the testator three or four days before his death and that he had told him nothing about either the deed of authority or the will; but, in consequence of information given him by his mother-in-law, he questioned the testator about the authority to adopt, which he admitted, but the will was not mentioned. This evidence is valueless in face of the substantial body of evidence on which the trial Judge has relied. With the exception of the writer, Srimanta Lala, all the witnesses in the case gave their evidence before the trial Judge. Of the four attesting witnesses to the will two were dead and two gave evidence at the trial. The son of Ramesh Chandra Sen, who died in 1922, stated that the signature on both documents looked like the signature of his father, and the son-in-law of Chandra Mohan Dastidar, who died about 1925 or 1926, stated definitely that the signatures on both documents were those of his father-in-law. The High Court take the evidence of the former of these two witnesses by itself, and hold that it did not prove that the will bears the signature of his father: but the evidence surely proves identity of the signature with a genuine one. The High Court deal very summarily with the evidence of the son-in-law of Chandra Mohan Dastidar. In their Lordships' opinion the evidence of this witness is valuable. The first of the attesting witnesses, who are alive, was Digambar Bhattacharji; the trial Judge thought he was evasive on certain points, affecting his private financial position, but accepted his evidence in so far as the factum of the will is concerned. The High Court refused to

accept any of his evidence, but in the opinion of their Lordships, they have given no sufficient reason for interfering with the conclusion of the trial Judge, who was in a much better position to judge of the credibility of this witness. In this view, the execution of the will by the testator and the signing of it by the attesting witnesses is amply proved. But, in their Lordships' opinion, this conclusion is confirmed by their examination and comparison of the admittedly genuine deed of authority with the will, as contemplated by S. 73, Evidence Act. Their Lordships are strongly impressed with the apparent identity in nature and age of the paper on which the two documents are written, and also with the apparent similarity of the ink; further, the signatures are very similar, with the one exception of the dissimilarity of the C of Chandra Mohan Dastidar, which was put to his son-in-law, but their Lordships agree with the learned trial Judge that this difference is *prima facie* inimical to the suggestion of forgery. As regards identity in nature and age of the paper and similarity of the ink, it should be noted that the suggested forgery is supposed to have taken place nearly thirty years later.

Some further observations should be made: the trial Judge thought the other living attesting witness, Dr. Beni Mohan Das, who admitted his signature to the deed of authority, deliberately refused to acknowledge his signature to the will, because of his financial relations with the respondent Bank. The High Court do no more than refer to the finding of the learned Judge, but it may be observed that even if the learned Judge's opinion of this witness be disregarded, his evidence only amounts to *non menini*, as to an occurrence thirty years before. Their Lordships do not agree with the strictures of the High Court on the evidence of the aged and infirm witness, Srimanta Ram Lala. On the question of delay, their Lordships agree with the trial Judge that the necessity for probate did not arise till after the death of the widow, who had made no adoption. Contrary to the construction placed on it by the High Court, their Lordships are of opinion that by the terms of the will the appointment of Saroda as executor did not emerge until there was adoption of a minor son, or, failing an adoption, until Saroda's son attained majority. Further, their Lordships desire to point out that knowledge of the dishonest dealing with the property by Saroda has not been brought home to the appellant by evidence, and that Saroda's dealings with the property are consistent with suppression of the will by him. Their Lordships are therefore of opinion that the finding

of the trial Judge as to the execution and attestation of the will should be restored and that probate should be granted to the appellant. This will not preclude the respondent Bank from maintaining in any ordinary civil action by or against them, any rights in the property to which they may deem themselves entitled. Their Lordships will, accordingly, humbly advise His Majesty that the appeal should be allowed, that the judgment and decree of the High Court should be set aside, and that the judgment and decree of the District Judge should be restored. The respondent will pay the appellant's costs on the pauper scale of this appeal and those in the High Court.

G.N. *Appeal allowed.*

Solicitors for Appellant — *W. W. Box & Co.*

Solicitors for Respondent — *Harold Shephard.*

*** A. I. R. (32) 1945 Privy Council 108**
(*From Calcutta*)

7th March 1945

LORD GODDARD, SIR MADHAVAN NAIR
AND SIR JOHN BEAUMONT

Srimati Renula Bose — Appellant

v.

Rai Manmatha Nath Bose and others
— *Respondents.*

Privy Council Appeal No. 25 of 1942; Bengal Appeal No. 46 of 1941.

(a) Bengal Money-Lenders Act (10 of 1940) — Object and applicability of.

The Act was passed to regulate and control money-lenders and money-lending transactions in Bengal and applies to loans made by any one and not only by professional money-lenders. [P 109 C 2]

(b) Bengal Money-Lenders Act (10 of 1940), Ss. 28 and 29—Scope and applicability of.

Sections 28 and 29 deal with the assignment of loans, where the relation of lender and borrower still exists, that is, while, the contract is still executory. They do not apply where there has been a judgment. The contract is then merged in the judgment and the relationship between the parties is that of judgment-creditor and judgment-debtor and no longer that of lender and borrower: ('36) 23 A.I.R. 1936 P. C. 63, *Rel. on.* [P 109 C 2]

(c) Bengal Money-Lenders Act (10 of 1940), S. 30—Effect of.

The effect of S. 30 is to afford a defence to a borrower as to the amount for which he is liable, and that is all that it does. It does not affect judgments already obtained, but merely provides that the amount of a judgment already obtained is to be taken into account in calculating the final amount for which a borrower may be liable. That section cannot of itself avail a judgment-debtor against whom a decree has been regularly obtained. [P 109 C 2; P 110 C 1]

(d) Bengal Money-Lenders Act (10 of 1940), S. 36—Power to re-open transactions extends to re-opening decree.

Section 36 (1) does not specifically mention a judgment or decree as one of the matters which the Court may re-open, but it is clear that it is intended to give the Court that power. The drafting of the

section is unfortunate and obscure, but inasmuch as by proviso 2 to sub-s. (1) it is enacted that in the exercise of its powers the Court shall not do anything which affects any decree other than a decree in a suit to which the Act applies, which was not fully satisfied by 1st January 1939 and as sub-s. (2) contains a variety of provisions as to what the Court may and may not do on re-opening a decree it is clear that the Legislature intended that the power of re-opening a transaction should extend to re-opening a decree obtained by a lender which had not been fully satisfied by 1st January 1939. [P 110 C 1]

(e) Bengal Money-Lenders Act (10 of 1940), Ss. 30 and 36 — S. 30 if retrospective: ('41) 28 A.I.R. 1941 Cal. 681, *REVERSED.*

In one sense it may be true to say that S. 30 has no retrospective effect because all that the section by itself does is to give the borrower a defence as to quantum when sued. But when S. 30 is read with S. 36 it is clear that the relief given by S. 30 can be granted where relief under the Act is sought by a judgment-debtor in respect of a decree which had not been fully satisfied by 1st January 1939 and which must therefore have been obtained before the Act came into force: ('41) 28 A. I. R. 1941 Cal. 681, *REVERSED.* [P 110 C 2]

(f) Interpretation of statutes — Words not in Act if can be read into it.

It is contrary to all rules of construction to read words into an Act which are not there unless it is absolutely necessary to do so. [P 110 C 2]

C. P. C. —

('44) Chitaley, Preamble, N. 7, Pts. 19 and 20.

* (g) Bengal Money-Lenders Act (10 of 1940), S. 36 — Declaration that judgment-debtor need pay no more under decree cannot be made under S. 42, Specific Relief Act or Civil P. C. — It can be made only under S. 36: 45 C. W. N. 1091, *REVERSED.*

Neither under S. 42, Specific Relief Act, nor under Civil P. C., can the Court make a declaration that the judgment-debtor need pay no more under a decree than the amount already paid. Such a result can only be reached by re-opening the decree under S. 36, Bengal Money-Lenders Act: 45 C.W.N. 1091, *REVERSED.* [P 110 C 2]

* (h) Bengal Money-Lenders Act (10 of 1940), S. 36 (5) — Decree assigned before Act to bona fide assignee for value—No relief under Act can be given to judgment-debtor against assignee—That the decree is consent decree is immaterial: ('41) 28 A.I.R. 1941 Cal. 681, *REVERSED.*

By reason of S. 36 (5) no relief under the Act can be granted to a judgment-debtor against a bona fide assignee for value of the decree where both the decree and the assignment took place before the Act came into operation. The fact that the decree was made by consent is immaterial, as is also the fact that the amount was agreed: ('41) 28 A. I. R. 1941 Cal. 681, *REVERSED.* [P 109 C 1, 2; P 110 C 1]

Sir H. Cunliffe and W. W. K. Page —

for Appellant.

C. T. Le Quesne and J. M. Pringle —

for Respondents.

Lord Goddard.—The action out of which this appeal arises was brought by the plaintiffs, who are respondents 1-4, to obtain relief under the provisions of the Bengal Money-Lenders Act, 1940, in respect of a mortgage dated 25th May 1914, whereby all persons interested in certain properties mortgaged them to the Maharaja of Darbhanga to secure the sum of Rs. 6 lacs with interest at 6 per cent. per

annum. The facts were not in dispute and it is unnecessary to set out the title of the various parties. It is enough to say that from time to time various amounts were paid to the mortgagor in respect of the sums due under the mortgage and that on 12th June 1935, in an action which he instituted against the mortgagors, a decree by consent was made in the action for some Rs. 4,58,058, the balance due to him under the mortgage, which together with the amount already paid would exceed double the amount originally advanced. On 17th September 1936, the Maharaja assigned the benefit of the decree and the benefit of the securities under the mortgage deed to the appellant who gave value therefor and on 2nd February 1937, she obtained the leave of the Court to execute the decree. On 1st September 1940, the Bengal Money-Lenders Act, 1940, came into operation, and thereupon respondents 1-4 instituted proceedings in the High Court of Calcutta claiming relief under that Act. By this time more than twice the sum advanced had been paid either to the Maharaja or the appellant, and the respondents claimed in the action a declaration that they were not liable to pay any more and also asked for repayment of money paid by them in excess of the amount allowed by the Act, though this latter claim was not pursued at the trial. The case was heard before Edgley J., who dismissed the action on grounds to which reference will be made hereafter. On appeal his decision was reversed by the Appellate Division of the High Court (Derbyshire C. J. and Nasim Ali J.), who granted a declaration that the plaintiffs in the action were not liable to make any further payments either under the mortgage or under the decree of 12th June 1935, or otherwise. It is from this decree of the High Court that the present appeal is brought.

The question for decision was conveniently summarised by Sir Herbert Cunliffe in these terms: Does the Act of 1940 enable the Court to afford relief to a mortgagor under a mortgage executed before the Act in respect of a final decree made by consent before the Act for the payment of an agreed amount of principal, interest and costs and assigned before the Act to a bona fide assignee for value where the rate of interest is well within the limits allowed by the Act? Their Lordships would, however, observe that in their opinion the fact that the decree was made by consent is immaterial, as is also the fact that the amount was agreed. Nor do they think that the rate of interest in the present circumstances is material. It seems to them that the real question here is whether the Court can grant relief to a judgment-debtor for money lent against a bona fide assignee for value of the

decree where both the decree and the assignment took place before the Act came into operation.

The Act No. 10 of 1940, was passed to regulate and control money-lenders and money-lending transactions in Bengal and applies to loans made by anyone and not only by professional money-lenders. Its main provisions so far as are material for present purposes are that maximum rates of interest are prescribed, and no borrower is to be liable to repay to a lender more than twice the amount of the principal advanced whatever the rate of interest may be. Provision had naturally to be made for cases where the lender assigned his rights, and Chap. 5 of the Act, ss. 28 and 29, deal with the assignment of loans. These two sections were meticulously examined by both the trial Judge and the Court on appeal, but, in the opinion of their Lordships, these sections have no application to the present case. They deal with the assignment of loans, where the relation of lender and borrower still exists; while, that is, the contract is still executory. They do not apply where there has been a judgment. The contract is then merged in the judgment and the relationship between the parties is that of judgment-creditor and judgment-debtor and no longer that of lender and borrower. If authority be needed for this proposition, which is really elementary, it will be found in the case referred to by Edgley J. in 63 I. A. 114¹ at p. 124. The section which gives relief to the borrower is S. 30. That section so far as is material is as follows:

"Notwithstanding anything contained in any law for the time being in force, or in any agreement,

(1) no borrower shall be liable to pay after the commencement of this Act

(a) any sum in respect of principal and interest which together with any amount already paid or included in any decree in respect of a loan exceeds twice the principal of the original loan . . . whether such loan was advanced or such amount was paid or such decree passed or such interest accrued before or after the commencement of this Act."

The effect of this section is to afford a defence to a borrower as to the amount for which he is liable, and that is all that it does. It does not affect judgments already obtained, but merely provides that the amount of a judgment already obtained is to be taken into account in calculating the final amount for which a borrower may be liable. So, if for instance the original loan were for Rs. 1000 and the principal and interest were payable by instalments, and a decree had been obtained for Rs. 500, not more than Rs. 1500 could be obtained under any subsequent decree. That section therefore cannot of itself avail a judg-

1. ('36) 23 A.I.R. 1936 P. C. 63 : 15 Pat. 210 : 63 I. A. 114 : 160 I. C. 285 (P.C.), Kusum Kumari v. Debi Prosad.

ment-debtor against whom a decree has been regularly obtained and remains unreversed.

Section 36 however provides for the reopening of past transactions. It is a long section containing a number of provisions and there is no need to quote it in extenso. By sub-s. (1) the Court is given power to reopen any transaction and take an account between the parties, reopen any account already taken following on an agreement between them, release the borrower from liability in excess of the limits specified in S. 30 and give other consequential relief. This may be done either in an action brought by the lender or in one brought by the borrower to obtain relief under the section. It will be observed that the sub-section does not specifically mention a judgment or decree as one of the matters which the Court may reopen, but it is abundantly clear that it is intended to give the Court that power. The drafting of the section is unfortunate and obscure, but inasmuch as by proviso 2 to sub-s. (1) it is enacted that in the exercise of its powers the Court shall not do anything which affects any decree other than a decree in a suit to which the Act applies, which was not fully satisfied by 1st January 1939, and as sub-s. (2) contains a variety of provisions as to what the Court may and may not do on re-opening a decree it is clear that the Legislature intended that the power of re-opening a transaction should extend to re-opening a decree obtained by a lender which had not been fully satisfied by 1st January 1939. Sub-section (5) however provides that nothing in this section shall affect the rights of any assignee or holder for value if the Court is satisfied that the assignment was bona fide and that he had not received the notice referred to in cl. (a) of S. 28, sub-s. (1). That is a notice which it is made obligatory on the lender to give to anyone to whom he assigns his debt. In their Lordships' opinion, the only right which the plaintiffs in this action had of re-opening the decree of 12th June 1935, was under this section. Had the decree not been assigned, they could have instituted an action for relief against the judgment creditor; but as it had been assigned to one who took it bona fide and for value and who ex hypothesi had not received the notice referred to in the section they cannot maintain any claim for relief against the assignee. The learned trial Judge thought that the sub-section did not protect the assignee because it referred to a notice which could not have been given, as the Act was not in force at the time of the assignment, he based his judgment on the ground that S. 30 could not affect a decree retrospectively. Their Lordships cannot agree with either of these grounds.

With regard to the first the assignee fulfils all the requirements of the section, and to hold otherwise is equivalent to saying that an assignee to whom notice could not be given is to be in as bad a position as one who had received notice. Mr. Le Quesne's main argument for the respondents was that "the rights of any assignee" referred to in the sub-section must be construed as meaning the rights given to an assignee under the Act, for instance, the right of indemnity given by S. 28, sub-s. (2). This means that the Court must read into the sub-section the words "conferred by this Act" immediately after the words "holder for value." If that is what the Legislature meant it would have been quite easy to say so. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so; whereas here the section as it stands is apt in its language to afford protection to the rights of bona fide purchasers for value as is nearly always given in legislation of this description. Their Lordships are also unable to agree with the opinion of the learned Judge as to S. 30 having no retrospective effect. In one sense this is true, because as already pointed out in this judgment all that the section by itself does is to give the borrower a defence as to quantum when sued. But when that section is read with S. 36 it appears to their Lordships to be clear that the relief given by the section can be granted where relief under the Act is sought by a judgment-debtor in respect of a decree which had not been fully satisfied by 1st January 1939, and which must therefore have been obtained before the Act came into force. It remains to say a word with regard to the judgment of the High Court on appeal. As their Lordships understand the judgment of the Chief Justice, he thought that it was unnecessary to invoke S. 36, but that he could give a declaratory judgment in favour of the plaintiffs, under S. 42, Specific Relief Act, or under the provisions of the Civil Procedure Code, declaring that they need pay no more. In whatever form such a declaration might be expressed, it would have the effect of restraining a judgment creditor who has obtained a regular and final decree from proceeding to execution. Such a result could only be reached by re-opening the decree under the provisions of S. 36 of the Act of 1940 which for the reasons given in this judgment does not apply to this case.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the decree of the High Court made in its civil appellate jurisdiction be set aside and the decree of the Court made in its ordinary original civil jurisdiction be restored, though

on different grounds. The first four respondents should pay the cost of the appeal to the High Court in its appellate jurisdiction and to His Majesty in Council.

G.N.

Appeal allowed.

Solicitors for Appellant — *Hy. S. L. Polak & Co.*

Solicitors for Respondents — *A. J. Hunter & Co.*

A. I. R. (32) 1945 Privy Council 111

(From Bombay)

19th March 1945

LORD THANKERTON, SIR MADHAVAN
NAIR AND SIR JOHN BEAUMONT

Tammanna Shivappa Kori and others
— Appellants

v.

*Parappa Girimallappa Kori, minor, by
his guardian, Satawa kom Giri-
mallappa Kori* — Respondent.

Privy Council Appeal No. 10 of 1944.

(a) Privy Council—Appeal—New point—Fact of adoption alone raised and dealt with before High Court — Question of validity of adoption held should not be allowed to be raised in appeal before Privy Council.

The plaintiff a Lingayat brought a suit for partition of joint family property relying upon his adoption. The defendants in the trial Court contended that the adoption if proved was invalid on various grounds including that there was a local custom among the Lingayats not to adopt in a joint Hindu family without the consent of coparceners. The trial Court held that the adoption was not proved. It also gave its finding on the issue of custom and held that there was no evidence of the local custom set up. In appeal before the High Court, no question was raised by the defendants as to the validity of the adoption if proved, the only question discussed and dealt with being as to the fact of adoption. In appeal before the Privy Council the defendants desired to argue that if the adoption was proved, it was invalid in law because the parties being Lingayats resident in a Kanarese District in the Province of Bombay, part of the Karnatik, were governed by the Dravid and not the Mayukha School of law and the adopting widow had neither the authority of the husband nor the consent of the coparceners to the adoption :

Held that in view of the fact that there was no evidence as to any special custom affecting the Lingayats, and that the question as to the school of law by which the parties were bound was not discussed in the High Court, and no authorities on the matter were referred to, the matter should not be allowed to be raised before the Board.

[P 112 C 2]

C. P. C. —

(44) Chitaley, S. 112, N. 7, Pt. 2.

(b) Hindu law—Adoption—Fact of adoption—Proof of—Delay of 38 years in making adoption—Adoptee six months old—Absence of persons of position at adoption ceremony—Invitation cards alleged to have been sent out not produced—Priest officiating at adoption not called nor photograph of adoption group called—Delay in registering deed of adoption — Effect of.

The widow's husband who was a member of a joint Lingayat family resident in a Kanarese District of the Province of Bombay, part of the Karnatik, died in 1895. The widow was alleged to have made

an adoption on 30th January 1933 and on the same day an adoption deed was executed which was registered on 29th May 1933. In coming to the conclusion that the fact of adoption was not proved the trial Court was impressed, among others, by the following points (a) that the delay of 38 years between the death of the widow's husband and the adoption was difficult to explain, (b) the age of the adoptee who was only six months' old at the date of adoption was an unusual age for adoption, (c) that no village officers or persons of position were present at the adoption ceremony, no invitation cards, which were alleged to have been sent out, were produced, and the priest who officiated at the adoption was not called. There was also no photograph of the adoption group such as was very commonly obtained :

Held that (1) as to point (a)—until the decision of the Privy Council in ('33) 20 A.I.R. 1933 P. C. 1 which was given on 4th November 1932 it was the generally accepted view in the Bombay Presidency that a widow could not adopt until she had the authority of her husband or the consent of the coparceners, and therefore the widow must have realised that her chances of establishing a valid adoption were the slightest, as she was not in a position to establish her husband's authority. But as a result of that Privy Council decision, she found herself in a position to make a valid adoption as neither the husband's authority nor the consent of coparceners was held necessary for an adoption by a widow by that decision. As the adoption was made within a year of that decision the delay of 38 years was accounted for.

[P 112 C 2 ; P 113 C 1]

(2) as to point (b)—the adoptee was the only male descendant of the widow and her husband—their daughter's daughter's son—and this might account for her desire to adopt him in preference to any one else. Moreover, she was 70 years old and delay might have been dangerous.

[P 113 C 1]

(3) none of the matters referred to in point (c) was at all conclusive, in deciding the fact of adoption.

[P 113 C 2]

(4) If circumstances had changed between January and May 1933 and if at the latter date adoption of the child had become impossible the delay in registering the deed, would have assumed a sinister aspect. But this was not the position. If the child had not been adopted at the time alleged, there was nothing to prevent his being taken in adoption on the day when the deed was registered. Therefore, the delay in registering the deed was of no consequence.

[P 113 C 1, 2]

Hindu Law —

(40) Mulla, Page 561, S. 512.

(38) Mayne, Page 287, para. 217.

(c) Evidence — Appreciation of, by trial Court — Appellate Court when may differ.

If the appellate Court differs from the trial Court who had seen the witnesses, on a pure question of appreciation of evidence it would be difficult to justify its action but its action would be justified where the trial Court failed to attach sufficient significance to the execution of a document.

[P 113 C 1]

C. P. C. —

(44) Chitaley, S. 107, N. 14, Pt. 2.

(41) Mulla, Page 1156 pt. (z).

(d) Hindu law—Adoption—Fact of adoption—Proof of—Discrepancies in evidence—Effect of.

Where all the witnesses agree as to the vital facts necessary to establish an adoption discrepancies in the evidence as to the respective positions occupied by the parties and the witnesses during the ceremony in the house where it took place are not sufficient for rejecting the evidence in support of the

ceremony of adoption when such discrepancies can be explained by the length of time which had elapsed between the ceremony and the date when the witnesses were called upon to give evidence. [P 113 C 1, 2]

Hindu Law —

('40) Mulla, Page 561, S. 512.

('38) Mayne, Page 287, para. 217.

C. S. Rewcastle and P. V. Subba Row —

for Appellants.

J. M. Parikh — for Respondent.

Sir John Beaumont.—This is an appeal from a judgment and decree dated 24th June 1940, of the High Court of Judicature at Bombay which reversed a judgment and decree of the First Class Subordinate Judge of Belgaum dated 15th August 1938. The parties are Lingayats, and the plaintiff sued for partition of the immovable joint family property, relying upon his adoption by his great grandmother, Satawa. The learned Subordinate Judge disbelieved the evidence as to the alleged adoption ceremony and held that the adoption was what he called "a paper adoption," by which he presumably meant an adoption evidenced by an adoption deed, but in which the necessary ceremony had not taken place. The High Court (N. J. Wadia and Sen JJ.) in appeal reversed this decision. In the defendant's written statement it was contended that if the adoption was proved it was, on various grounds, invalid, and certain issues upon these points were raised, including issue 2, which was whether defendant proved that there is a local custom amongst the Lingayats not to adopt in a joint Hindu family without the consent of the coparceners. As the learned trial Judge held that no adoption was proved, it was unnecessary for him to deal with these issues, but he answered them in case it should be held in appeal that his decision as to the fact of adoption was wrong, and, in answer to issue 2, he found that there was no evidence of the local custom set up. In the High Court no question was raised as to the validity of the adoption if proved, the only question discussed and dealt with in the judgment being as to the fact of adoption. Before their Lordships' Board, counsel for the appellants desired to argue that, if the adoption was proved, it was invalid in law since the adopting widow had neither the authority of her husband nor the consent of the coparceners to the adoption. The contention sought to be raised was that the parties, being Lingayats resident in a Kanarese district of the Province of Bombay, part of the Karnatik, are governed by the Dravida School of law, and not by the Mayuka School, and that the decision of this Board in 60 I. A. 25¹ that a widow can adopt

without the authority of her husband or the consent of the coparceners has no application. In view of the fact that there is no evidence as to any special custom affecting the Lingayats, and that the question as to the school of law by which the parties are bound was not discussed in the High Court, and no authorities on the matter were referred to, their Lordships were not prepared to allow the matter to be raised before the Board. Moreover, their Lordships observe that the litigation in 60 I. A. 25¹ originated in the District of Dharwar, which is as much a part of the Karnatik as is the adjoining District of Belgaum from which the parties in the present suit come, and there is nothing on record to show that the parties in 60 I. A. 25¹ were not Lingayats, as their names suggest that they were. This consideration may explain why the suggestion that 60 I. A. 25¹ does not apply to the Lingayat community in the Province of Bombay was not advanced in the High Court. It is unnecessary to decide any such question and their Lordships will confine their decision to the fact of adoption.

Satawa who is alleged to have adopted the plaintiff, Parappa, was the junior widow of Girimallappa, who died in the year 1895. They had one daughter, who also had one daughter, and the plaintiff is the son of that daughter. Girimallappa, at the time of his death, was joint with his brother Shivappa and with Shivappa's sons, defendants 1 and 5. Shivappa died in 1904, but his sons remained joint with their sons, defendants 2 to 6. The adoption is alleged to have taken place on 30th January 1933, and on the same day an adoption deed was executed, which was registered on 29th May 1933. In rejecting the evidence as to the fact of adoption, the learned Subordinate Judge was impressed with certain aspects of the case of a negative character, as well as by discrepancies in the evidence produced on behalf of the plaintiff. He thought, in the first place, that the delay of 38 years between the death of Satawa's husband and the adoption was difficult to explain. But it is to be noticed that until the decision of this Board in 60 I. A. 25¹ which was given on 4th November 1932, it was the generally accepted view in the Bombay Presidency that a widow could not adopt unless she had the authority of her husband or the consent of the coparceners. Satawa alleged in the present case that she had the authority of her husband to adopt, but she was unable to call any evidence to support her statement to that effect, and, as she was the junior widow, it is unlikely that any such authority was given. She must therefore have realised that until the decision in 60 I. A. 25¹ showed that the consent of the

1. ('33) 20 A.I.R. 1933 P. C. 1 : 57 Bom. 157 : 60 I. A. 25 : 141 I. C. 9 (P.C.), Bhimabai Jivangouda v. Gurunath Gouda.

coparceners was unnecessary her chances of establishing a valid adoption were of the slightest. This consideration, in their Lordships' view, accounts for the delay.

The learned Judge was also impressed with the age of the plaintiff who was only about six months' old at the date of adoption, which the learned Judge thought an unusual age for adoption. But it is to be noticed that the plaintiff is the only male descendant of Satawa and her husband, and this may account for her desire to adopt him in preference to anyone else. As she was 70 years of age, obviously delay might have been dangerous. The learned Judge also pointed out that no village officers or persons of position were present at the adoption ceremony; no invitation cards, which were alleged to have been sent out, were produced, and the priest who officiated at the adoption was not called. There is also no photograph of the adoption group such as is very commonly obtained. The learned Judge thought all these matters gave rise to suspicion, but none of them is at all conclusive. He disbelieved the evidence called on behalf of the plaintiff to establish the adoption ceremony on the ground that it was discrepant in many particulars. These discrepancies were carefully analysed in the judgment of the High Court, and it is not necessary to discuss them in detail. They were mainly discrepancies as to the respective positions occupied by the parties and witnesses during the ceremony in the house where it took place; but all the witnesses agreed as to the vital facts necessary to establish an adoption.

If the High Court had differed from the Subordinate Judge, who had seen the witnesses, on a pure question of appreciation of evidence it would have been difficult to justify their action, but in their Lordships' view, the Judges of the High Court were right in thinking that the Subordinate Judge failed to attach sufficient significance to the execution of the adoption deed. There is no doubt that such a deed was registered on 29th May 1933. It is Ex. 10 and shows on its face that the parties appreciated the necessity for, and the requisites of, an adoption ceremony. If circumstances had changed between January and May 1933, and if at the latter date adoption of the plaintiff had become impossible, for instance, by the death of his parents, so that there was no one to give him in adoption then there would have been some ground for suspecting that the parties were setting up a false adoption as made at a time when adoption was possible; and, in such circumstances, a close scrutiny of the evidence would have been called for, and the defects in the evi-

dence and the delay in registering the deed, would have assumed a sinister aspect. But this was not the position. If the plaintiff had not been adopted at the time alleged, there was nothing to prevent his being taken in adoption on the day when the deed was registered. It seems to their Lordships impossible to suppose that the parties, realising the necessity for an adoption ceremony, nevertheless omitted to hold one when they were competent to do so. Their Lordships agree with the learned Judges of the High Court in thinking that in the circumstances there was not sufficient ground for rejecting the evidence in support of the adoption ceremony, and that the discrepancies in such evidence can be explained by the length of time which had elapsed between the ceremony and the date when the witnesses were called upon to give evidence. Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed with costs.

G.N.

Appeal dismissed.

Solicitors for Appellants—*Douglas Grant & Dold.*
Solicitors for Respondent—*Hy. S. L. Polak & Co.*

A. I. R. (32) 1945 Privy Council 113

(From Oudh)

6th February 1945

LORDS THANKERTON, MACMILLAN AND
SIMONDS, SIR MADHAVAN NAIR AND
SIR JOHN BEAUMONT

Thakur Lalta Bakhsh Singh and others
— Appellants

v.

Lala Phool Chand and others —

Respondents.

Privy Council Appeal No. 46 of 1942; Oudh Appeal No. 9 of 1940.

(a) Will—Construction—Intention of testator is governing factor — Defects in expression cannot prevent carrying out such intention.

In construing a will 'the primary duty of a Court is to ascertain from the language of the testator what were his intentions' and 'in doing so they are entitled and bound to bear in mind other matters than merely the words used.' 'It is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. These intentions must be ascertained by the proper construction of the words he uses and once ascertained they must not be departed from.'

[P 117 C 1]

Rules of construction are rules designed to assist in ascertaining intention; and the applicability of many such rules depend upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. Defects in expression should not be allowed to prevent the carrying out of the testator's intentions. [P 117 C 1]

(b) Hindu law—Widow — Limited interest is created in absence of express provision in will.

Where no express provision has been made by the testator a Hindu widow takes an interest for her life whether by implication under the will or under the Hindu law. [P 117 C 2]

(c) Limitation Act (1908), Art. 141 — Cause of action held arose on death of junior widow.

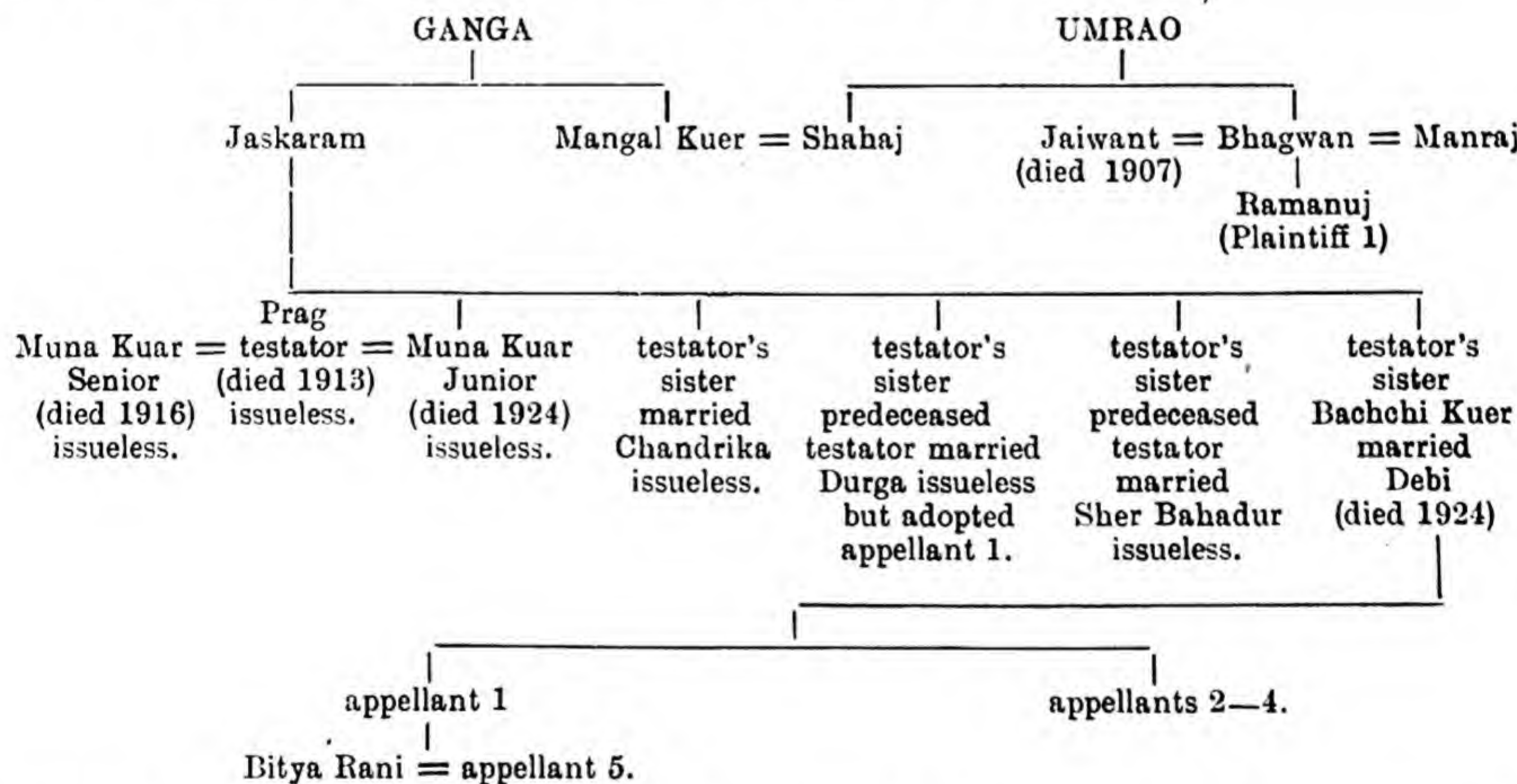
Where a testator has made provision for the junior widow, and she has remained in possession until her death the cause of action for the suit arises only after her death. [P 118 C 1]

C. S. Rewcastle and J. M. Pringle —
for Appellants.

W. Wallach — for Respondents.

Sir Madhavan Nair.—This is an appeal from a decree of the Chief Court of Oudh dated 12th December 1939, which modified a decree of the Additional Civil Judge of Bara Banki dated 12th October 1936, by affirming the said decree on condition of respondents 1 to 3 hereinafter called the respondents (who were plaintiffs 2, 3 and 4 in the suit) paying the appellants (defendants 1 to 5) a sum of Rs. 13,592. The said decree awarded the respondents 7/20th (equivalent to 5 annas 7 1/5 pies) share in the property claimed in the suit. The suit out of which this appeal arises was origi-

nally brought to recover possession of the entire property (16 annas share) mentioned in the plaint; but it came to be confined to a 9 annas share only. Plaintiff 1 considering himself entitled to the entire property in suit under a will dated 30th March 1896, executed by one Prag Baksh Singh (hereinafter called the "testator"), sold a 9 annas share of it to the respondents by means of two successive sale deeds in 1932 and 1933, and another 2 annas out of the remaining 7 annas share to plaintiffs 5 and 6, who afterwards withdrew from the suit by virtue of a compromise with the defendants. Later on, plaintiff 1 also withdrew from the suit. Thus out of the 6 plaintiffs, plaintiffs 1, 5 and 6 withdrew, and the suit was continued by the respondents in respect of the 9 annas share in the suit property which they had purchased from plaintiff 1. The disputed property was admittedly in the possession of the appellants. The testator to whom the property in suit belonged died on 20th May 1913. His relationship with the appellants and plaintiff 1 will appear from the following pedigree :



It will be seen from the pedigree that the testator died issueless but he left two widows — both called Muna Kuar — the senior of whom died on 20th August 1916, and the junior on 24th April 1924. The testator left two sisters also, one of whom Bachchi Kuar had four sons, appellants 1 to 4. Appellant 5 is the husband of appellant 1's deceased daughter. To her appellant 1 had given a village out of the property in suit. It is not now in dispute that appellants 1 to 4 are the sons of the testator's sister who was married to Debi Baksh Singh. It will be further seen that the testator's father's sister married one Shahaj and that Shahaj had a brother called Bhagwan whose first wife was the mother of plaintiff 1. Plain-

tiff 1 thus appears to be no relation of the testator, but it is not now in dispute that the son of the testator's aunt, the wife of Bhagwan Singh, is Ramanuj plaintiff 1. The main questions involved in the appeal relate to the respective rights of the parties to the suit property. As these depend on the construction of the will of the testator it is necessary to reproduce the relevant portions of it which are as follows :

"Para. 1. That after the death of the executant the wife of the executant shall possess and enjoy the entire aforesaid property without any rights of transfer, e. g., mortgage, sale and gift, etc., up to the time her conduct and character is not contrary to that of kith and kin, i. e., (up to the time) she is not guilty of any immorality.

Para. 2. That if the executant contracts a second marriage in the life-time of the said wife and has any child male or female from the second wife then the former wife shall be entitled as against the issue from the latter to receive as much Guzara as may suffice for her maintenance.

Para. 3. That in case there is no male and female issue and wife, the wife of Bhagwan Bux Singh, taluqdar Lahar, pergana, Haidergarh, district Barabanki, who is the aunt (father's sister) of the executant and also the wife of Thakur Durga Bux Singh, taluqdar Nilgaon, the wife of Thakur Debi Bux Singh, resident of village Kundi, district Sitapur, and wife of Thakur Sher Bahadur Singh, taluqdar Muhommadpur, pergana Fatehpur, district Barabanki, who are the sisters of me, the executant, shall divide the aforesaid property equally amongst themselves and after them their male and female issue shall be the owners and in case there is no issue, then that female shall continue to enjoy and possess her share till her lifetime and after her demise her husband shall remain in possession and occupation of her property till his lifetime and after him that very share shall be divided equally upon the issue of those ladies out of the aforesaid four ladies who have got issue.

Para. 4. That no other member of my family is entitled to my property, nor has he any claim to it. If there appears any claimant, then his claim as against the aforementioned four ladies shall be void and untenable."

On the testator's death, his two widows entered into possession of the property. When the senior widow died, a dispute arose between the junior widow, and the testator's sister Bachchi Kuar, mother of appellants 1 to 4, regarding the rights of the former in the property. At about this time, the pressure of mortgage debts contracted by the testator at high rates of interest threatened a disruption of the estate and the question of payment of the debts became urgent. The situation was met by the execution of a family settlement dated 1917, the only importance of which, so far as the present appeal is concerned, is that under it appellant 1, in consideration of being allowed certain properties, took over the liability of paying all the debts due from the estate of the testator. It has now been found that in all a sum of Rs. 71,992 was paid by appellant 1 to the creditors of the testator and that he spent a further sum of Rs. 1,127-6-0, in litigation about the debts, the total sum amounting to Rs. 73,119-6-0. This finding, arrived at by the High Court, has not been questioned before the Board. It has also been found that the above payments made by appellant 1 were by no means voluntary, but were made by him as having an interest in the property.

The appellants, and the respondents (transferees from plaintiff 1), both rest their claim to the property in the suit on the terms of the will. Generally stated, the appellants contended, amongst other grounds which need not be detailed, that plaintiff 1 is not entitled to any property under the testator's will, as he is not the son of the testator's aunt, that the right

to the property, if he took any under the will, was barred by limitation under Art. 140 or Art. 141, Limitation Act, that appellant 1 had paid up the debts of the testator and had incurred costs in connexion with litigation relating to those debts, and that he was entitled to recover the same with interest from persons claiming the property. Article 140, Limitation Act, prescribes a period of "12 years" for a suit "for possession of immovable property by a remainderman, a reversioner (other than a landlord) or a devisee," and the period begins to run from the time "when his estate falls into possession." Article 141 prescribes a period of 12 years for "a like suit" by a Hindu or Mahomedan entitled to the possession of immovable property on the death of a Hindu or Mahomedan "female" and the period begins to run from the time "when the female dies."

Holding that plaintiff 1 is the son of the testator's aunt referred to in the will which finding, as stated already, is not challenged before the Board, the Subordinate Judge came to the conclusion on a construction of para. 3 of the will that he was entitled to 7/20ths share of the property in the suit and that the suit was not barred by limitation. As regards the debts alleged to have been paid by appellant 1, he held that these amounted to Rs. 71,992, but that he was not entitled to recover anything from the respondents as the income realised by the appellants who were in possession of the property amounted to Rs. 1,00,000. The Subordinate Judge also held that appellant 1 was not entitled to any costs of litigation, and interest. In the result, he gave a decree in favour of the respondents for possession of 7/20ths share (equivalent to 5 annas 7 1/5 pies out of 16 annas) in the entire property in suit—though a 9 annas share had been sold to them—along with the mesne profits which were left to be determined later.

Their Lordships may now conveniently refer to the Subordinate Judge's construction of para. 3 of the will and also to the reasoning on which his finding as to limitation is based. As regards the first, it will be remembered that when the testator died issueless on 20th May 1913, he left surviving him two widows, his sister Bachchi Kuar the mother of the appellants, and plaintiff 1 the son of Bhagwan and his first wife mentioned in cl. 3, as the first of the 4 lady legatees. His other sisters mentioned in the will and their husbands had died issueless. The construction put upon para. 3 of the will by the Subordinate Judge has been thus correctly summarised by the High Court. "The Court held that as on the death of Mt. Muna Kuar junior the issue of only two of the four ladies mentioned in the will namely plaintiff 1 (son of the wife of

Bhagwan Baksh Singh) and defendants 1 to 4 (sons of Bachchi Kuar, sister of Prag Baksh Singh and wife of Debi Baksh Singh) were living, one-fourth of the property would go to plaintiff 1 and another one-fourth to defendants 1 to 4 and that the remaining half of the property would be divided equally among the issues of the wife of Bhagwan Baksh Singh and Mt. Bachchi Kuar under cl. 3 of the will, so that plaintiff 1 and defendants 1 to 4 would each be entitled to a one-fifth share out of the remaining half. In this way the Court found that the share of plaintiff 1 in the entire property of Durga Baksh Singh was one-fourth plus one-tenth, that is, seven-twentieths."

On the question of limitation, the Subordinate Judge held that time began to run against the plaintiff only from the death of the junior widow in 1924, and as the suit was brought within 12 years from that date it was not barred by limitation either under Art. 140 or Art. 141, Limitation Act, whichever article applied, overruling the appellants' contention that limitation began to run from the death of the senior widow which took place in 1916.

On appeal to the High Court, the learned Judges agreed with the opinion of the Subordinate Judge on the construction of cl. (3) of the will and with respect to the share of the property that plaintiff 1 was entitled to get under it, and also on question of limitation, but differed from him as regards the claims of the appellants to recover from plaintiff 1, i.e., his transferees, his share of the debt found binding on the testator's estate discharged by appellant 1, and of the litigation expenses incurred by him. As stated already they held that a total Rs. 73,119-6-0 had been spent by appellant 1 by way of paying the creditors of the testator and meeting the litigation expenses, and that the respondents should bear their portion of this debt. As a result of the finding called for from the lower Court, it was found that the profits realized by the appellants from the suit property after the death of Muna Kuar junior up to 23rd July 1913, that is, up to three years before the suit, amounted to Rs. 34,285-11-5. The learned Judges, therefore, held that "the plaintiffs' proportionate (7/20ths) share of this liability comes to Rupees 25,592 approximately. As their share of the profits is Rs. 12,000 there is a balance of Rs. 13,592 against them and this they must pay to the defendants before getting possession of the property." The learned Judges, however, refused to award interest on the amount claimed by them on the ground that "they have been in possession of the property and in receipt of the profits thereof in lieu of that money." In the result, they modified the decree passed by the Subordinate Judge in favour of the res-

pondents by decreeing them "possession of 7/20ths of the property in suit on condition of their paying Rs. 13,592 to the defendants (appellants)". In support of this appeal, the learned counsel for the appellants urged, (1) that plaintiff 1, from whom the respondents derived their title to the property, took nothing under the testator's will, because the operation of cl. 3 of the will was limited to a contingency which never arose in the case; (2) that if plaintiff 1 took any interest at all under the will, it became vested in him at the senior widow's death in 1916 and the suit to enforce his claim is now barred; (3) that, since the two sisters of the testator for whom provision had been made in the will, had predeceased him, their portions lapsed and plaintiff 1 can have no share in them; (4) (a) that appellant 1 should have been allowed interest on the sum due to him, and (b) that he should not have been made liable to account to the respondents for any of the profits of the property sued for in respect of any period ending 3 years before suit; and (5) that, since plaintiff 1 was not able to give the respondents full title to 9 annas share in the suit property, they could claim only damages as provided for in the deed, and that in any event, the respondents could be given a decree only for 9/16ths of the share held to belong to plaintiff 1, i.e., 9/16ths of 7/20 and not 7/20ths of the suit property, as he sold them only 9 annas out of the 16 annas share of the property.

Their Lordships will now proceed to consider these arguments in order. As regards ground (1), it may be mentioned that before the Courts in India plaintiff 1 was sought to be excluded from sharing the property not on the ground now alleged but on other grounds; however, as the point relates to the construction of the will their Lordships will consider it. It is argued that though the testator had no male or female issue, having regard to the fact that his two wives were living at the time of his death the contingency contemplated for the operation of para. 3 of the will, namely, "in case there is no male and female issue and wife" did not arise, and therefore plaintiff 1 never took any interest under the will. The argument is ingenious, but their Lordships are unable to accept it. The will is in Urdu and the Subordinate Judge says "the language used is simple and to my mind there is absolutely no ambiguity in the bequest made by Prag Baksh Singh." The words relied on in the English translation have no technical significance. It is obvious that the will has not been drawn up by any trained conveyancer. As was observed by their Lordships in 41 I. A. 51,¹ in *constru-*

1. (1913) 41 I. A. 51 : 21 I. C. 339 (P. C.), Venkata Narasimha Apparow v. Parthasarthy Appa Row.

ing a will, "the primary duty of a Court is to ascertain from the language of the testator what were his intentions" and "in doing so they are entitled and bound to bear in mind other matters than merely the words used." These other matters would include the "surrounding circumstances," and their Lordships proceed to say, "that native testators should be ignorant of the legal phrases proper to express their intentions or of the legal steps necessary to carry them into effect is one of the most important of circumstances which the Courts must bear in mind and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But these intentions must be ascertained by the proper construction of the words he uses and once ascertained they must not be departed from." It is also well settled "that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention: and the applicability of many such rules depend upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied . . ." (*see* 38 I.A. 54.)² Applying these principles, the true intention of the testator has to be ascertained from the language used by him in the will.

Except the inference drawn from the words "In case there is no male and female issue and wife" nothing has been suggested as to why the testator should have intended when he made the will that if his wife or wives survived him (there being no male and female issue) the legatees mentioned in para. 3 of the will should forfeit their legacies. In the present case, the testator had a wife living when he made the will. In the ordinary course he would be succeeded by his wife and after her death the properties would pass to others according to law, but provision has now been made by the testator as to whom they should pass after her death. This is what has been done in para. 3 of the will. It has not been argued that the testator could not validly make the arrangements which he has made, the property being his own. It appears to their Lordships that the intention of the testator which they have to seek is sufficiently clear. He intended that the legatees mentioned in para. 3 of the will, who of course would include plaintiff 1, should take their legacies when the wife is dead, which means that the bequests made in the clause will not operate as long as the widow (or either of the two widows) lived. Their Lordships see no reason why they should

construe the expression "in case . . . no wife" in any sense other than this, namely, that the testator intended in that paragraph that the legacies to the four ladies mentioned in it were to take effect after the wife is no more, that is the wife of the testator should enjoy the property during her lifetime and, after her death, the legatees should take their shares, it being admitted that the testator left no issue male or female. In their Lordships' view this construction would be more consonant with the "habits of thought" in the mind of a Hindu testator, than what has been suggested by the appellants' learned counsel. A more felicitous expression or a fuller one than the one in question might well have been chosen by the testator to express his intention more clearly, but before the Subordinate Judge, the language of the will, as stated by him, did not create any difficulty, and the point now urged was not taken either before him or before the High Court. As well pointed out by their Lordships in the case mentioned above, "defects in expression should not be allowed to prevent the carrying out of the testator's intentions". In this view of para. 3 of the will, plaintiff 1 cannot be excluded from taking the benefits under the will if he is not disentitled in any other way.

It was next urged, that if the plaintiff took any share of the property under the will his claim was barred by limitation. In this connexion it is said that the wife referred to in para. 3 of the will after whose death the legacies would take effect is the senior wife of the testator and as she died in 1916, more than 12 years before suit, it is barred by limitation either by Art. 140 or 141. This argument is based on the contention that no provision has been made in the will for the junior widow and the wife in para. 3 cannot therefore be the junior wife who admittedly died within 12 years before suit. Both Courts in India have rejected the argument for very good reasons. It is true that no express provision has been made by the testator for the junior widow, but their Lordships feel no doubt that she takes an interest for her life whether by implication under the will as the High Court thought or under the Hindu law, it is not necessary to determine. Their Lordships would only add that so far as the widows themselves were concerned, they never seemed to have thought that the testator had not made any provision for the junior widow, for their Lordships find that on the testator's death his two widows entered into equal possession of the property and mutation was made for equal shares. They also find (*see* the Subordinate Judge's judgment) that on the death of the senior widow of the testator the junior

2. (11) 38 Cal. 468 : 38 I.A. 54 : 10 I.C. 641 (P.C.), *Bhagabati Barmanya v. Kalicharan Singh*.

widow remained in possession of the entire property and the Subordinate Judge states his opinion that "this was quite in accordance with the intentions and wishes of the testator as expressed in cl. 3 of the will." The testator having made provision for the junior widow, and she having remained in possession until her death the cause of action for the suit arose only after her death which took place in 1924 and, as the suit was brought in 1933, it is not barred by limitation.

It was next argued, that the shares of the predeceased sisters of the testator have lapsed and should not have been divided amongst the children of the other sisters. The answer to this question would depend upon the correct construction of para. 3 of the will. Courts in India have taken the view that the testator under para. 3 of the will has granted only life estates to the ladies mentioned therein and that on their death he has given their shares to their children, if they have any; and in case there is no issue then to their husbands and after them he has decided that those shares should be divided equally amongst the children of those sisters who have issue. In this view of the will, with which their Lordships agree, the shares of the predeceased sisters will be divided between the children of the other sisters as held by the Courts in India and the question of the lapse of the shares does not arise.

The next argument related to the interest claimed by appellant 1 on the money — Rs. 13,592 — which the High Court has found should be paid by the respondents before they obtain delivery of their share of property decreed in their favour. Since the appellants have already discharged the debt of the testator by making this payment which rightly falls to the share of the respondents, it cannot be seriously contended that interest should not be paid on the same to the appellants. Their Lordships hold that the appellants are entitled to interest on Rs. 13,592 which they decide should be at 6 per cent., the usual court rate (from 1st January 1921, to the beginning of the three years before suit). In connexion with this argument, Mr. Pringle, learned junior counsel for the appellants, desired to advance the view that appellant 1 was not liable to account to the respondents for any of the profits of the property sued for in respect of any period ending three years before suit and that the High Court was wrong in holding that he was so liable. This ground was not taken in the appellants' case but was taken only now. Their Lordships are not therefore inclined to allow the learned counsel to argue this question.

The next argument urged but faintly was

that inasmuch as plaintiff 1 was not able to give the respondents the full 9 annas share of the property sold to them under the sale deeds they are entitled to claim from the vendor only damages as provided for in the sale deeds. In their Lordships' view the terms of the deed do not necessarily preclude the respondents from recovering whatever share falls to plaintiff 1 even though they are not entitled to get the full 9 annas share. In equity they are entitled to get the smaller share now decreed to them. The last argument urged was that in any event the respondents are entitled to only 9/16ths of the 7/20ths of the sold property now found to belong to plaintiff 1. This argument, urged also before the High Court, was rightly rejected by the learned Judges for the reason that : "Sale deed Ex. 2 clearly shows that Ramanuj Bhan Bakhsh Singh (plaintiff 1) sold a 9 annas shares in the entire villages and other properties in dispute and the sale was held by this Court to be a sale of the property and not merely of Ramanuj Bhan Bakhsh Singh's right to sue. There is therefore no reason to reduce the property purchased by plaintiffs 2 to 4 (the respondents) to a fraction of what Ramanuj Bhan Bakhsh Singh has been found entitled to. Having purchased a 9 annas share in the property plaintiffs 2 to 4 are, in our opinion, entitled to the entire 5 annas 7 1/5 pies share that has been found to be the share of Ramanuj Bhan Bakhsh Singh in the property in dispute." Their Lordships agree with this view.

In the result, the appeal fails except as regards the interest on Rs. 13,592 which their Lordships have held that the appellants are entitled to recover from the respondents in addition to Rs. 13,592. The decree of the High Court will be modified to this extent. As regards costs, their Lordships think the proper order should be that the appellants should pay the costs incurred by the respondents before the Board reduced by one-tenth of the same; the order as to costs in the Courts below will stand. Their Lordships will humbly advise his Majesty accordingly.

R.K. *Decree modified.*
Solicitors for Appellants — A. J. Hunter & Co.
Solicitors for Respondents —
Hy. S. L. Polak & Co.

* A. I. R. (32) 1945 Privy Council 118
(From Lahore)

31st January 1945

LORD THANKERTON, SIR MADHAVAN
NAIR AND SIR JOHN BEAUMONT
Mahbub Shah — Appellant

v.

Emperor.

Privy Council Appeal No. 64 of 1944.

* Penal Code (1860), S. 34 — For common intention there must be pre-arranged plan — Criminal act must be in concert of that plan — Same intention is not common intention.

Common intention within the meaning of S. 34 implies a pre-arranged plan. To convict the accused of an offence applying S. 34 it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. It is no doubt difficult if not impossible to procure direct evidence to prove the intention of an individual; it has to be inferred from his act or conduct or other relevant circumstances of the case. Care must be taken not to confuse same or similar intention with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice. The inference of common intention within the meaning of the term in S. 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case.

[P 120 C 2; P 121 C 1]

Phineas Quass — for Appellant.

B. J. McKenna — for the Crown.

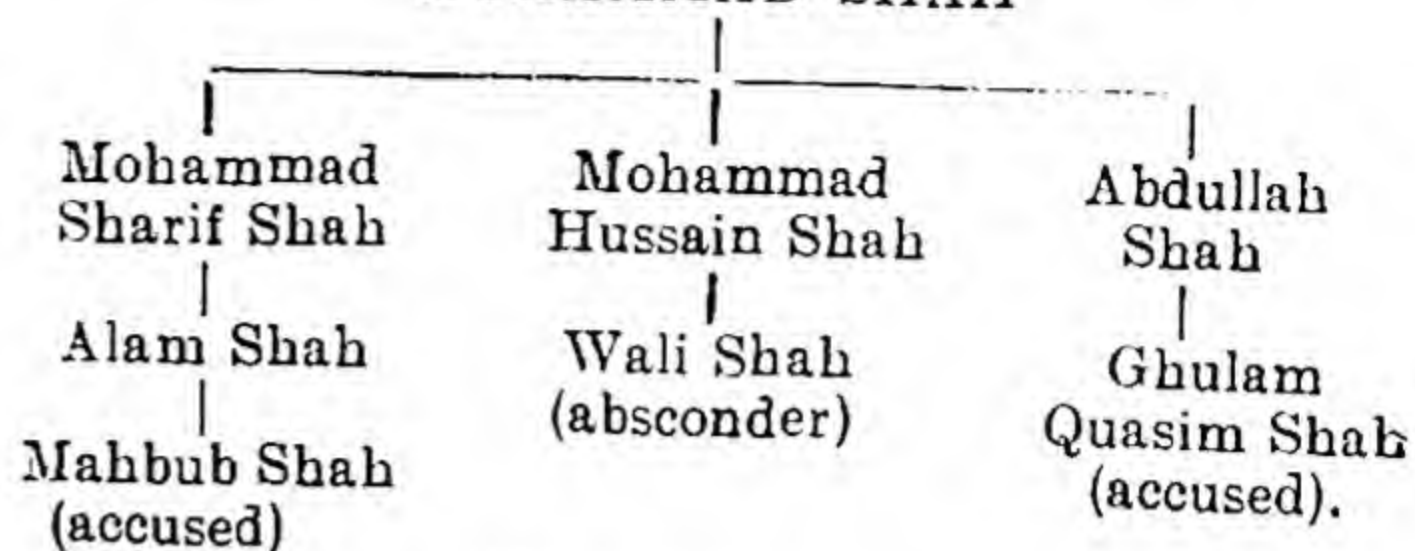
Sir Madhavan Nair.—This is an appeal by special leave against a judgment of the High Court of Judicature at Lahore dated 14th March 1944, confirming on appeal the conviction of the appellant of the murder of one Allah Dad and the sentence of death passed on him by the Sessions Judge, Mianwali, on 20th December 1943. The appellant Mahbub Shah is aged 19. He has been convicted of murder under S. 302, read with S. 34, Penal Code. He was also convicted of the attempted murder of one Hamidullah Khan and sentenced to seven years' rigorous imprisonment; but that conviction has not been brought before the Board. The main question raised in this appeal is whether the appellant has been rightly convicted of murder upon the true construction of S. 34, Penal Code. Section 34 runs as follows:

"When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

Along with the appellant, his cousin Ghulam Quasim Shah, aged 18, was also convicted under S. 302/34, Penal Code, and sentenced to transportation for life. Ghulam was convicted under S. 307/34 also, and was sentenced to five years' rigorous imprisonment by the Sessions Judge, but his convictions and sentences have been set aside by the High Court. The deceased Allah Dad died as the result of gunshot wounds inflicted on him. One Wali Shah, who is said to have fired the shot that killed the deceased, is a fugitive from justice and has not been so far arrested. His father Mohammad Hussain Shah, who was committed to, the Sessions Court on a charge of abetment of murder, was acquitted by the Sessions Judge. The following table given in the judgment of the High Court shows the relationship between

the appellant and the other persons who are alleged to have been concerned in this crime.

MOHAMMAD SHAH



The prosecution case as accepted by the High Court may be briefly stated:—On 25th August 1943, at sunrise, Allah Dad, deceased, with a few others left their village Khanda Kel by boat for cutting reeds growing on the banks of the Indus river. When they had travelled for about a mile downstream, they saw Mohammad Shah, father of Wali Shah (absconder) bathing on the bank of the river. On being told that they were going to collect reeds, he warned them against collecting reeds from land belonging to him. Ignoring his warning they collected about 16 bundles of reeds, and then started for the return journey. While the boat was being pulled upstream by means of a rope, Ghulam Quasim Shah, nephew of Mohammad Hussain Shah—acquitted by the High Court—who was standing on the bank of the river asked Allah Dad to give him the reeds that had been collected from his uncle's land. He refused. What happened subsequently was 'spoken to by two boys Nur Hussain P. W. 10, and Nur Mohammad P. W. 11, whose version of the story has been accepted as true by the High Court and summarised as follows:

"Quasim Shah then caught the rope and tried to snatch it away. He then pushed Allah Dad and gave a blow to Allah Dad with a small stick but it was warded off on the rope. Allah Dad then picked up the lari from the boat and struck Quasim Shah. Quasim Shah then shouted out for help and Wali Shah and Mahbub Shah came up. They had guns in their hands. When Allah Dad and Hamidullah tried to run away, Wali Shah and Mahbub Shah came in front of them and Wali Shah fired at Allah Dad who fell down dead and Mahbub Shah fired at Hamidullah, causing injuries to him." [Lari is a bamboo pole for propelling the boat, about ten feet long and six inches thick.]

On the above facts, the learned Judges of the High Court came to the conclusion that Ghulam Quasim was wrongly convicted of murder under S. 302/34, Penal Code., on the following reasoning. Bhandari J., with whom Teja Singh J. concurred, first held that Ghulam Quasim had no common intention of killing any member of the complainant party when he went to the bank of the river in order to demand the bundles of reeds which had been collected from his uncle's lands. Then the learned Judge addressed himself to the question "whether a common

intention" to commit the crime which was eventually committed by Mahbub Shah and Wali Shah came into being when Ghulam Quasim Shah shouted to his companions to come to his rescue and both of them emerged from behind the bushes and fired their respective guns, and this he answered in the negative, holding that "so far as Quasim Shah was concerned he did no more than ask his companions to come to his assistance when he was knocked with a pole by the deceased" and that "he could not have been aware of the manner in which assistance was likely to be rendered to him or his friends were likely to shoot at and kill one man or injure another." In the result, he was acquitted of all offences. The learned Judge then proceeded to examine the case of the appellant and Wali Shah. He stated that the case of Mahbub Shah, who was armed with a single barrelled gun, and of Wali Shah, who had a double barrelled gun, however stood on a different footing. He distinguished their case on the following ground:

"As soon as they ran to the assistance of Ghulam Quasim Shah, they fired simultaneously in the direction of the complainants killing Allah Dad on the spot and causing injuries on the person of Hamidullah Khan. It is difficult to believe that when they fired the shots they did not have the common intention of killing one or more of the complainant party. If so, both of them are guilty of murder notwithstanding the fact that the fatal shot was fired by only one of them, namely, Wali Shah, absconder."

It will be observed that according to the learned Judge a common intention to commit the crime came into being when appellant and Wali Shah fired the shots. Their Lordships will now proceed to consider whether the above reasoning is correct, and S. 34, Penal Code, has been rightly applied to the facts of the case. Attention has already been drawn to the words of the section. As it originally stood, the section was in the following terms:

"When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone."

In 1870, it was amended by the insertion of the words "in furtherance of the common intention of all" after the word "persons" and before the word "each," so as to make the object of the section clear. Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say "the common intentions of all" nor does it say "an intention common to all." Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of S. 34 successfully,

it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

On careful consideration, it appears to their Lordships that in the present case there was no evidence and there were no circumstances from which it might be inferred that the appellant must have been acting in concert with Wali Shah in pursuance of a concerted plan when he along with him rushed to the rescue of Ghulam Quasim. The exaggerated circumstances alleged by the prosecution to invoke the aid of S. 34, Penal Code, have been found against by the High Court who have acted solely on the evidence of P. W. 10 and P. W. 11. There was no evidence to indicate that Ghulam Quasim was aware that the complainant party had been cutting reeds from his uncle's lands, or that the appellant and Wali Shah had been kept behind the bush to come and help him when called upon to do so. The evidence shows that Wali Shah "happened to be out shooting game" and when he and the appellant heard Ghulam's shouts for help they came up with their guns; the former shot the deceased, killing him outright, and the appellant shot at Hamidullah Khan inflicting injuries on his person. Indeed, the High Court negated the existence of a "common intention" at the commencement in the sense in which their Lordships have explained the term by stating — in considering the application of S. 34, Penal Code, to the case of Ghulam — what has been already quoted, viz.:

"that the sole point which requires consideration now is whether a common intention to commit the crime came into being when Ghulam shouted to his companions to come to his rescue and both of them emerged from behind the bushes and fired their respective guns."

Having answered the above question in the negative as regards Ghulam Quasim, the learned Judges thought, as Bhandari J. has expressly stated, that with respect to the appellant and Wali Shah, it must be held that the common intention of killing one or more

of the members of the complainant party came into being later, when they fired the shots. Their Lordships cannot agree with this view. Their Lordships are prepared to accept that the appellant and Wali Shah had the same intention, viz., the intention to rescue Quasim if need be by using the guns and that, in carrying out this intention, the appellant picked out Hamidullah for dealing with him and Wali Shah, the deceased, but where is the evidence of common intention to commit the criminal act complained against, in furtherance of such intention? Their Lordships find none. Evidence falls far short of showing that the appellant and Wali Shah ever entered into a premeditated concert to bring about the murder of Allah Dad in carrying out their intention of rescuing Quasim Shah. Care must be taken not to confuse same or similar intention with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice. In their Lordships' view, the inference of common intention within the meaning of the term in S. 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case. That cannot be said about the inference sought to be deduced from the facts relied on by the High Court in distinguishing the case of the appellant from that of Ghulam Quasim.

Mr. MacKenna, the learned counsel for the Crown, besides supporting the judgment of the High Court on the grounds mentioned in it, called their Lordships' attention to the following additional circumstance in further support of it. Reference was made to the concluding portion of the evidence of P. Ws. 10 and 11, where it is stated that "when Allah Dad and Hamidullah tried to run away, Wali Shah and Mahbub Shah came in front of them..." and fired shots. This circumstance is stated more definitely in the evidence of P. W. 6. He stated "... we then tried to run away but Mahbub Shah and Wali Shah coming in front of us and prevented our escape" and fired shots. It was argued that the attempt of the appellant and Wali Shah to prevent the escape of the complainant party shows that they were actuated by a common intention to commit the crime, and from that moment the Court is entitled to infer a common intention to commit the crime even though there was no pre-concerted plan to shoot till then. This additional circumstance does not, in their Lordships' view, advance the prosecution case any further, and, moreover, the learned Judges of the High Court do not rely on it. In the circumstances, their

1945 K/16

Lordships are not satisfied that the appellant was rightly convicted of the offence of murder under S. 302, Penal Code, read with S. 34. His conviction for murder and the sentence of death passed on him should, therefore, be quashed. In this view, the further question raised in the appeal whether, in the event of his conviction being confirmed, the sentence of death passed on him should not, having regard to the circumstances of the case and his age, be commuted to one of transportation for life does not arise for consideration. For the reasons indicated above, their Lordships have humbly advised His Majesty that the appellant having succeeded in his appeal, his appeal should be allowed and his conviction for murder and the sentence of death set aside.

R.K.

*Appeal allowed.*Solicitors for Appellant — *Douglas Grant & Dold.*Solicitors for the Crown — *Solicitor, India Office.*

A. I. R. (32) 1945 Privy Council 121 (From Allahabad)

1st March 1945

LORDS THANKERTON, SIMONDS AND
GODDARD, SIR MADHAVAN NAIR
AND SIR JOHN BEAUMONT

Lakshman Prasad — Appellant

v.

John and others — Respondents.

Privy Council Appeal No. 62 of 1943; Allahabad Appeal No. 1 of 1939.

Companies Act (1913), S. 230 — Action by holders of debentures issued by company under security of fixed and floating charge over its assets—Right of labourers or workmen to priority—Extent of — Receiver appointed by Court acting under order of Court obtaining loan of Rs. 31,000 from A to pay company's employees who had gone on strike as their salaries had not been paid for three months and agreeing to hypothecate property worth Rs. 60,000—A held entitled to a charge in priority to debenture holders.

The company (a mill) issued mortgage debentures and created in favour of the debenture-holders a fixed charge on its immovable properties and a floating charge on rest of its properties and undertaking. In the suit by the debenture-holders to enforce their security a Receiver was appointed by the Court for the protection of the property. The mill hands had not been paid for at least three months and had gone on strike creating a disturbance which threatened the safety of the company's property. The Receiver was therefore authorised by the Court to raise money on such terms as he might think proper. Acting on the authority of the Court's order, the Receiver entered into an agreement with A under which A lent Rs. 31,000 to the Receiver to pay the salaries of the mill employees and took away the moveable properties of the company which A claimed to have purchased and it was agreed (a) that if the goods removed by A were found to be the property of or under lien to A then the Receiver shall hypo-

thecate to A sufficient property worth Rs. 60,000; (b) if the goods were found not to be the property of or under lien to A then A will set off Rs. 31,000 towards the price of the said goods and A shall have the same right and lien in respect of this amount of debt as the employees and labourers had in respect of the goods according to law. The goods referred to in the agreement were found to be the property of A :

Held that (1) as the goods referred to in the agreement were found to be the property of A cl. (b) of the agreement did not come into operation and therefore the question what right or lien the employees or labourers might have in respect of the goods did not arise. The obligation in cl. (a) did become effective and the Receiver became bound to hypothecate to A property worth Rs. 60,000;

[P 123 C 2]

(2) the terms of cl. (a) no doubt provided that the lender A should be subrogated to the same rights of preferential payment as the relevant sections of the Companies Act prescribed for labourers and workmen, and in a debenture-holders' action as in a winding up of the company this preferential right was limited to the property subject to a floating charge. But, this was not the real question for decision ;

[P 123 C 2]

(3) it was cl. (a) which became operative and the question was what was the right of the lender A to whom the Receiver had agreed to hypothecate property worth Rs. 60,000 and to this there could be only one answer that A was entitled to a charge in priority to the debenture-holders. The fact that there was not in fact any hypothecation to A could not help the debenture-holders: against them an agreement to hypothecate was as effectual as an actual hypothecation ;

[P 123 C 2]

(4) under the authority given by the Court the Receiver could validly raise money by a charge on the company's property ranking in front of the debentures.

[P 123 C 1]

Sir T. Strangman and S. P. Khambatta —
for Appellant.

C. S. Rewcastle and U. Sen Gupta —
for Respondents.

Lord Simonds. — These consolidated appeals from a decree of the High Court of Judicature at Allahabad dated 3rd August 1938, which varied a decree of the Subordinate Judge at Agra dated 27th April 1931, raise the question whether the appellant Lakshman Prasad (who will be called "the appellant") is entitled as against the respondents, the holders of debentures issued by an Indian limited company known as Agra United Mills, Ltd., and herein called "the company", to any and what priority over such debentures in respect of moneys which had been borrowed from him by the receiver appointed in a suit brought by such respondents to enforce their security. The Subordinate Judge held the appellant entitled to priority in respect of all the property subject to the charge, whether fixed or floating, created in favour of the debentures: the High Court limited the priority to the property subject to the floating charge. The appellant seeks to restore the order of the Subordinate Judge, the respondents to deprive him of his priority even in

respect of the property subject to the floating charge.

The company was formed in the year 1920 with a nominal capital of Rs. 150,00,000, of which Rs. 65,00,000 were issued, for the purpose of working certain cotton and other mills which had previously belonged to the respondents or some of them. In the same year, the company issued 200 first mortgage debentures of Rs. 25,000 each bearing interest at 8 per cent. per annum. These debentures, which were in common form, were secured by a trust deed dated 8th August 1923, which contained (a) a specific charge on certain immovable and other assets of the company, and (b) a floating charge on the rest of its property and undertaking. In and after the year 1925, the company also obtained financial assistance from the appellant's father, Rai Bahadur Seth Suraj Bhan (whose heir and legal representative he is), under the terms of an agreement dated 9th November 1925. This agreement, which was of an elaborate character, provided (*inter alia*) for the lender having a lien for moneys advanced by him on raw materials in the company's godowns and other materials, products and property as therein specified.

In 1927 the trustees of the debenture trust deed filed a suit (No. 84 of 1927) in the Court of the Subordinate Judge at Agra to enforce this security and in that suit on 30th November 1927, one, P. N. Raina, was on the application of the plaintiff trustees appointed receiver of the property and undertaking of the company. The case was presented to the Judge, and was accepted by him, as one of grave urgency, in which the appointment of a receiver was necessary for the protection of the property. It was alleged that the company had not been able to pay its staff and mill-hands for at least three months and that the mill hands had therefore gone on strike, creating a disturbance which threatened the safety of the company's property. On the following day, 1st December 1927, upon a report made by the receiver the Court made a further order in these terms :

"The Mill-hands have to be paid and from the letter of the District Magistrate it appears that the Mill-hands have been promised their dues, and if they do not get their salaries then there is every chance of a riot and disturbance at the Mill-hands. The Mills are about to file an appeal. In case Messrs. Suraj Bhan and Kunwar Ganesh Sinha decline to pay the money which they promised, then you can sell such properties which is admittedly theirs or raise money on such terms as you think proper. The plaintiffs should come forward to co-operate with you. The money which will be paid by Messrs. Suraj Bhan and Kunwar Ganesh Singh or any one else will confer on them the lien which the Mill-hands have on the property which is in the Mill-premises."

It appears that Messrs. Suraj Bhan and Kunwar Ganesh Sinha did "decline to pay the money which they promised", whatever their obligation may have been. The receiver was therefore by the order authorised to raise money on such terms as he might think proper. Their Lordships entertain no doubt that under this authority the receiver could validly raise money by a charge on the company's property ranking in front of the debentures. It is not to be supposed that a lender could be found to advance money on any other terms than that he should have priority for the sums advanced by him for the salvage of the property. Acting on the authority of this order the receiver on 4th December 1927, entered into an agreement with the appellant's father which was in the following terms:

"I have been appointed Receiver by the Court of the Additional Sub-Judge Agra, in suit No. 84 of 1927 — *Major A. John v. The Agra United Mill Limited*, and under an order, dated 30th November and 1st December 1927, the Court has authorised me, the executant, to contract a sufficient amount of loan and pay off the salaries of the labourers, and to run the Mill so far as possible. Accordingly I have made, Seth Suraj Bhan Rai Bahadur, who has been financier of the mill from before and has invested money in it, willing to advance to me at this time Rs. 31,000 in cash bearing interest at annas 12 per cent. per month, on promise of paying back the amount after six months, so that salaries of the employees and labourers may be paid and the said Seth Sahab may take away all the moveable property, such as bales of prepared yarn, grain, flour, maida (fine flour), cotton, bales, packing materials, waste and other goods under preparation, i.e., under process, which lie within the limits of the mill and which are stated by the Seth Sahab to be owned and purchased by him. Accordingly the parties have come to an agreement. I, the executant, have received Rs. 31,000 in cash from Seth Suraj Bhan, Rai Bahadur, the proprietor of firm Seth Chunni Lal, resident and rais of Belanganj, Agra. As regards these goods it has been agreed upon that as there is no opportunity for sufficient enquiry at this time, hence in future if these goods will be proved to be the property and to have been purchased or under lien of Seth Sahab aforesaid, then within 10 days of the said decision I shall hypothecate to Seth Sahab aforesaid to his satisfaction, sufficient property worth at least Rs. 60,000. If these goods will not be proved to be the property or under lien to Seth Sahab aforesaid, then he (Seth Sahab aforesaid) will set-off the sum of Rs. 31,000 towards the price of the said goods and Seth Sahab shall have the same right and lien in respect of this amount of debt and only to that extent as the employees and labourers have in respect of these goods according to law and justice. The remaining goods aforesaid or the market value of the same, if any, shall after setting off this debt, be paid by Seth Sahab aforesaid to me, the executant, and shall be liable for the same. All these proceedings have been taken under the order of the Court of the Additional Subordinate Judge of Agra, hence there is no personal liability of me, the executant, in any way."

It is necessary to state this agreement in full since it appears to their Lordships that the rights of the parties depend upon a proper appreciation of its effect and that the High

Court has in this respect fallen into error. It is not in dispute that the sum of Rs. 31,000 was duly paid to the receiver or that this sum was applied by him in the manner contemplated by the agreement or that the goods therein referred to were proved to be the property of the lender and were in due course removed by him. From these facts two consequences follow. In the first place, it is clear that that part of the agreement which begins with the words: "If these goods will not be proved to be the property or under lien to Seth Sahab" did not come into operation and therefore the question what "right or lien" the "employees or labourers" might have "in respect of these goods according to law and justice" does not arise. In the second place it is clear that the obligation contained in the immediately preceding sentence of the agreement did become effective and the receiver became bound to "hypothecate to Seth Sahab aforesaid to his satisfaction sufficient property worth at least Rs. 60,000."

In these circumstances, their Lordships consider that the judgment of the High Court proceeds upon a wrong basis. The terms of the agreement, by reference to which the learned Judges of that Court have determined the issue, may be assumed to be an infelicitous way of providing that the lender should be subrogated to the same rights of preferential payment as the relevant sections of the Indian Companies Act prescribe for labourers and workmen, and there is no reason to doubt the correctness of the conclusion to which the High Court has upon that basis come, that in a debenture-holders' action as in a winding up of the company this preferential right is limited to the property subject to a floating charge. But, as already pointed out, this is not the real question for decision. It is the earlier part of the agreement which became operative and the question is what is the right of the lender to whom the receiver has agreed to "hypothecate sufficient property worth at least Rs. 60,000." To this question there can be only one answer. The lender is entitled to a charge in priority to the debenture holders. It has been urged that the order does not expressly authorise the creation of a prior charge. That is true, but such priority is implicitly authorised. For, if it were not so the order would be stultified and the property could not be saved. It has been further urged that there was not in fact any hypothecation. This also appears to be true. But it cannot help the debenture-holders: against them an agreement to hypothecate is as effectual as an actual hypothecation. This is the construction to which the Subordinate Judge came and in their Lordships' opinion he was right. The

decrees under review in this appeal were made not in the debenture-holders' suit, to which reference has been made, but in a fresh suit which the appellant commenced upon the directions given by the Subordinate Judge on his application to have his rights determined in that suit. All proper parties appear to have been before the Court and the result is the same.

Their Lordships are of opinion that the order of the High Court should be set aside and the order of the Subordinate Judge restored and that the respondents should pay the appellant his costs of these appeals and of the appeal to the High Court and will humbly advise His Majesty accordingly.

G.N. *Appeals allowed.*

Solicitors for Appellant — *T. L. Wilson & Co.*

Solicitors for Respondents —

Douglas Grant & Dold.

A. I. R. (32) 1945 Privy Council 124

(From Calcutta : ('40) 27 A. I. R. 1940 Cal. 115)

7th May 1945

LORD WRIGHT, SIR MADHAVAN NAIR

AND SIR JOHN BEAUMONT

Midnapore Zamindary Co. Ltd.

— *Appellant*

v.

Kumar Narendra Nath Roy and others

— *Respondents.*

Privy Council Appeal No. 64 of 1943; Bengal Appeal No. 13 of 1939.

(a) Words and Phrases — "Nij" qualifying tenures excludes appurtenant lands.

The word "Nij" when it appears as qualifying the tenure in a village would limit the scope of the grant to the village alone, thereby excluding its appurtenant lands if any. [P 127 C 1]

(b) Words and Phrases—"Nadir hoddapar" — Meaning explained.

The expression "Nadir hoddapar" indicates land on one side of the river only since the word hoddapar is used for the purpose of excluding from the grant the bank of the river. [P 127 C 2]

Wynn Parry and S. A. Kyffin — for Appellant.

Sir W. Monckton and J. M. Pringle —

for Respondents.

Sir Madhavan Nair.—This is an appeal from a decree of the High Court of Judicature at Fort William in Bengal, dated 19th July 1939 which varied the decree of the Subordinate Judge of Nadia, dated 17th May 1937, and decreed the suit of the original respondent (hereinafter referred to as "the respondent") in part. The appellant before the Board is the defendant, the Midnapore Zemindary Co. Ltd., and the respondents are the sons of the deceased respondent and his heirs. The main question in the appeal relates to the respective titles of the parties to the suit properties. The

appeal arises out of a suit instituted by "the respondent" for a declaration of his zemindary title to the properties set out in the schedules to the plaint, for cancellation of the tenures described therein, and for possession of the lands described in the four schedules attached thereto, by evicting the appellant company, and for mesne profits.

The suit properties are comprised in Estate Tauzi No. 491. This estate has land in various mouzas in different parts of Nadia district and in two mouzas of the neighbouring district of Murshedabad and pays an annual revenue of Rs. 18,263-14-9. The estate belongs to 14 co-sharers who had opened separate accounts under S. 10, Bengal Land Revenue Sales Act, (Act 11 of 1859). Of these, separate account No. 7 represents the interest of one Bhupendra Nath Mustafi. This interest had been mortgaged to "the respondent" and a further charge on the same had also been created in his favour. On these transactions he obtained a mortgage decree for the amount due to him and also for an additional sum paid by him as revenue. In 1934-35, separate account No. 7 fell into arrears with respect to some kists of revenue due to Government. There is another account, No. 13, which had also fallen into arrears. These were put up for sale by the Collector, but no bids were offered. He, therefore, stopped the sale and, following the procedure laid down in Act 11 of 1859, put up the entire estate No. 491 for sale. "The respondent" offered the highest bid in his own name and was declared purchaser of the estate by the Collector who issued him the sale certificate. It is stated in the plaint that the Collector put him in symbolical possession of the properties but when he went to take actual possession he was resisted by the appellant company which claimed to hold them under certain tenures which were protected by being registered in the "common register" under the Bengal Revenue Sales Act. The properties claimed in the suit were originally included in three schedules, but afterwards the plaint was amended and Sch. 4 was added to it. To appreciate the arguments before the Board their Lordships think it is necessary to refer to the properties in the schedules which run as follows :

Schedule 1.—Tenures held by the defendant Company Estate bearing Touzi No. 491 of Nadia Collectorate of which the disputed property is a portion and are comprised in Mauza No. 23 known as Sadi-pur situate lying within the jurisdiction of Karimpur Thana, District Nadia, including Habrapara and Ajlanpur and Mauza No. 63 known as Rajapur within the Tebatta Thana District Nadia.

Schedule 2.—Tenures held by the defendant Company Estate bearing Touzi No. 491 of Nadia Collectorate of which the disputed property is a portion and are comprised in the resumed Chakaran Khas

Khamar land formerly belonging to Thakur Das Roy and others in Mauza No. 24 known as Topla within the jurisdiction of Karimpur thana District Nadia.

Schedule 3.—Tenures held by the defendant Company Estate bearing Touzi No. 491 of Nadia Collectorate of which the disputed property is a portion and are comprised in Mauza Dear Kartikpur alias Moktarpur (stated as Char Moktarpur No. 17 in "A" Register) within the jurisdiction of Karimpur thana, District Nadia and Moktarpur within the jurisdiction of Naoda thana, District Murshedabad being No. 22 in Register "C."

Schedule 4.—Tenure held by the defendant company in Mouza Joyrampur No. 64, Mrigi Mouza No. 69, Pratapnagar No. 65, Kanainagar No. 62, Sreerampur No. 61, Nasirpur No. 66, situated within (?) the limits P. S. Tehatta and Mebishkhala No. 27, Chack Ajlampur No. 25, situated in P. S. Karimpur, Pardiari No. 59 in "C" Register, are all situated in the District Nadia except Pardiari which is in the District of Murshedabad and lying within the Estate bearing Touzi No. 491 of Nadia Collectorate." Schedule 4 refers to lands described in the suit as "chit lands" of Mouza Sadipur. The parties are agreed that "chit" means detached, and the term is used to denote portions of a revenue paying mouza which have been detached from the parent mouza and included within the boundaries of other revenue paying mouzas, the title remaining with the owner of the parent mouza. Sadipur is the parent mouza of lands described in Sch. 4, the lands lying detached in six of the neighbouring villages named in the schedule. Before setting out the case of the appellant company, it will be advantageous if their Lordships refer to S. 37, Bengal Revenue Sales Act, 1859, and also the details of the title under which the appellant company claims to hold the properties. Its title is based upon Exception 3 of S. 37. The section, so far as it is relevant for the appeal, states :

"The purchaser of an entire estate in the permanently settled districts of Bengal (Bihar and Orissa), sold under this Act for the recovery of arrears due on account of the same shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants"

with certain exceptions. Exception 3 relied upon by the appellant company is as follows:

"Thirdly.—Talukdari and other similar tenures created since the time of settlement and held immediately of the proprietors of estates and farms for terms of years so held, when such tenures and farms have been duly registered under the provisions of this Act."

In the original written statement the appellant company raised various pleas besides setting out its title to the lands. As none of these pleas, which were all found against the appellant company by the appellate Court, though found in its favour by the Subordinate Judge, are now raised before the Board, their Lordships will only refer to them in passing before setting out the details of the appellant's title. It was alleged by the appel-

lant company that the sale of the entire estate by the Collector was illegal and ultra vires and was brought about by fraud on the part of "the respondent," that he prevented the company from bidding at the revenue sale, that he had no title to sue, and that he was estopped from claiming that he had purchased the estate free from encumbrances. As stated already, these questions are not now before the Board as the appellant company has elected not to contest the findings though the validity of them had been raised in the grounds of appeal. The scope of the appeal is therefore much reduced. The only question which their Lordships have got to deal with in this appeal is confined to the plea of title set forth by the appellant company in the written statement. Their Lordships will now refer to the details of this title and the findings thereon by the Courts below. The appellant company claims title to these properties as purchasers from the Bengal Indigo Company of its interests in them. The following extract from the High Court's Judgment sets forth succinctly and clearly the details of the title of the Bengal Indigo Company. On 25th March 1860, two of the proprietors of Estate No. 491 Lakshmidas Mustafi and Sarbeswara Mustafi, executed two Patni Pottas in favour of J. B. Mackintosh, Manager of the Patikabari concern of the Bengal Indigo Company (Exs. H and Ex. H (1)—B18 and 23). The grant was taken by Mackintosh for the said Indigo Company. The two Pottas are in the same terms. By the first Potta (Ex. H) Lakshmidas created in favour of Mackintosh three Patni Taluks, namely :

(i) a Patni Taluk in respect of his 4 as. undivided share in four Mouzas and one Para, namely, Nij Mouza Sadipore, Rajapore, Azlampore, and Haitapara including Jannagar at an annual rental of Rs. 456-8-0; (ii) a Patni Taluk in respect of his undivided 4as. 8gds. 3k. 5d. share in a resumed Chakran called Khaskhamar Topla at an annual rental of Rs. 13; and (iii) a Patni Taluk in respect of his undivided 4as. 17gds. 3k. 1d. share in Diar Kartikpur alias Muktarpur at an annual rental of Rs. 373.

By the said second Potta (Ex. H1) Sarbeswar who had the same share in the estate as Lakshmidas had created 3 similar Patni Taluks in favour of the said company. The net result was that the Bengal Indigo Company had a Patni Taluk covering 8 as. share of the four Mouzas, viz., Nij Sadipore, Rajapore, Azlampore and Haitapara. This Patni goes by the name of Patni Mehal Sadipore. Another Patni Taluk covering 8as. 17gds. 2 Karas odd share in Topla and a third Patni

taluk covering 9as. 15gds. 2 K.O.-2d. share in the Diar Kartikpore alias Muktarpore. On 19th July 1862, the said company applied for registration of the said tenures under S. 40 of Act 11 of 1859 and the said tenures were registered on 11th November 1862, by the Collector in the Common Register (B211, B200 to 205). The appellant company has purchased the interest of Bengal Indigo Company in these patni taluks.

On the issue of title, as also on the other issues as already stated, the Subordinate Judge found in favour of the appellant company and dismissed "the respondent's" suit. It is not necessary for the purposes of this appeal to notice in detail the learned Judge's findings on the appellant company's title, but it may be stated as summarised by the High Court that he held that

"the tenures of the defendants had been validly registered in the common register of the tenures. In any event the legality of the registration cannot be questioned in the civil Court more than a year after their registration. The chit lands of Sadipore in Mouzas Sreerampore, Mirjoy, Joyrampore Kanainagore, and the two Azlampore chaks, as also char Muktapore in the District of Murshedabad and small areas in Protapnagore and Nazirpore are included in the defendant company's tenures and from them also the said company cannot be ejected."

Reversing the findings of the trial Court and, on their construction of the title deeds, the High Court decreed the suit in part. To ascertain the extent of the relief granted to the respondent and also the exact scope of the appeal before the Board, their Lordships may refer to the decree passed by the High Court, the relevant portions of which run as follows:

"It is ordered and decreed that the decree of the Court below be varied in the manner following, namely, (a) the plaintiff's zemindary right is declared to the lands in suit except Mouza Pardiari; (b) the plaintiff and the defendant company be in joint possession in respect of 1 anna 6 gandas 2 kara and 2 kranti share of Nij Mouza Sadipur, Mauza Rajapore, Mouza Azlampore and Mouza Hayetpara including Jannagore, that is, in respect of the lands described in Sch. 1 of the plaint; (c) the plaintiff be put into khas possession of after ejecting the defendant from the chit lands of the mouzas mentioned in (b) above, that is, the land mentioned in Sch. 4 of the plaint including the lands in Mouza Mirgay but excluding the lands in Mouza Pardiari . . ."

The respondent has not preferred any cross appeal with respect to the relief which has been refused to him. It will be noticed that in the order portion of the judgment of the High Court and in the decree which followed it, Mouza Muktarpur J. L. No. 22 within Naoda P. S. in District Murshedabad appearing in Sch. 3 of the plaint is not mentioned as among the land to which khas possession is declared. That this was due to an oversight has been now admitted. Having regard to the above decree, it is admitted by the parties

that no question now arises before the Board with regard to their title to lands in Sch. 1 of the plaint, nor does any question arise with regard to the land in Sch. 2, or the lands in Sch. 3, except as regards Muktarpur within the jurisdiction of Murshedabad district being No. 22 in Register "C." The substantial question that now arises really relates only to the title to the lands in Sch. 4, and to Muktarpur No. 22 in Register "C," in Sch. 3. As regards the lands in Sch. 4, however, the appellant company does not press its case with respect to lands Nos. 65 and 66; and "the respondent" has given up his case with respect to Pardiari No. 59.

The two questions therefore that the Board have to consider are: (1) Has the appellant company made out a title to the lands in Sch. 4, omitting those mentioned above, and to (2) Muktarpur 22 in Register "C" in Sch. 3. Such lands in Sch. 4 are as already stated the chit lands of Mouza Sadipur. Both parties averred in the High Court that the documents Exs. H and H1 on which the appellant company's title depends have not been correctly translated. The learned Judges of the High Court translated for themselves the relevant portion of the documents which are identical in terms as follows:

"I having notified that I would grant patni settlement of my four annas share in Nij Mouza Sadipur and Mouza Rajapur and Mauza Ajlampore and Mouza Hayetpara including Jannagore—four Mouzas and one Para included in the aforesaid Dihi including Khas Khamars and of my 4as. 8gds. 3k. 5d. share in Khas Khamar Tapla, the resumed Chakran formerly of Thakur Das Roy and others, and of my 4as. 8gds. 3k. 5d. share of Diar Kartikpur otherwise called Muktarpur which is beyond the limit of the river Kharia (Kharia Nadir hoddapar)."

In view of the above terms, the learned Judges held that in regard to Sadipur the documents indicated clearly that the grants covered the grantors' share in Nij Mauza Sadipur. They did not qualify the other three mouzas by the word "Nij." They therefore held that the grantors did not include in the grants the chit lands of Mouza Sadipur in other villages. The question whether the grants include these chit lands therefore depends on the meaning of the word Nij. The significance of this word in the light of the circumstances of the case was the main argument advanced in connexion with the title to these lands. Except saying that the use of this word indicates that the chit lands of Sadipur in other villages are not included in the grant, the learned Judges have not explained the meaning of the word. No light is thrown on its meaning by the judgment of the Subordinate Judge for it does not mention the word at all as appearing before Sadipur. The appellant company's learned counsel says it indicates

that the chit lands are included in Sadipur, the word being a word of "inclusion", while the respondent's learned counsel asserts that it is a word of "exclusion" and excludes the chit lands. Their Lordships would have been in a better position to decide the question if the learned Judges of the High Court both of whom know the Bengalee language, had given their interpretation of the term, but they have not done so. Their Lordships must therefore decide it on the materials available to them.

In Wilson's Glossary the word is stated to mean "own, peculiar", used sometimes in the sense of *nij-jot* and *nij-jot* is stated to mean "lands cultivated by the proprietors or revenue-payers by themselves, and for their own benefit; also, land allowed to be set apart for the private maintenance of a zamindar, on which before the decennial settlement in Bengal, no revenue was assessed." This explanation is followed by the word *Nij-taluk* which is stated to mean "own taluk or estate; in Bengal, a portion of land of which the proprietor or rent-payer collects the rent from the cultivators direct without any intermediate agency; also the private lands of a zamindar, or those cultivated by himself for his own benefit." These interpretations suggest to their Lordships that the word "Nij" when it appears as qualifying the tenure in a village as in the present case, would limit the scope of the grant to the village alone, thereby excluding its appurtenant lands if any. The translation of the word appearing in the official translation of the documents is "proper" which would show that what was granted was Sadipur proper. The boundaries of Mouza Sadipur and Rajpur, etc., given in column 6 of Ex. M. M. (1), extract from the common register of the Nadia Collectorate in respect of Tauzi No. 491 show that Sadipur is a definite and distinct block of land. The land was described with reference to its boundaries by the appellant company's predecessors when they applied for registration. Their Lordships must infer that what was granted to them was Sadipur included in the boundaries. If the chit lands attached to it had been given, some indication of it would have appeared in the common register. Exhibit Y. Y. 2, Revenue Survey Map of Mouza Sadipur, etc., shows Sadipur with boundaries similar to that given, in M. M. 1. In Map No. 1, also Sadipur appears as a distinct entity by itself. A careful consideration of the boundaries of the mouza and its situation appearing in the plans referred to, leads their Lordships to the conclusion that the learned Judges of the High Court were right in holding that the chit lands, though they may be attached to the parent mouza, were not actually given by the gran-

tors under the title deeds; and their Lordships therefore hold that the chit lands of Sadipur were not granted to the predecessors of the appellant company. The other passage in the title deeds referred to by the High Court to which a passing reference was made by the learned counsel, does not also advance the case of the appellant on this point.

The next question is whether Muktapore No. 22 in register "C" was included in the grants. What was granted under the deeds to the appellant company's predecessor was "Diar Kartickpur, otherwise called Muktarpur which is beyond the limit of the river Kharia." There are two Muktarpurs, Muktarpur No. 17 lying east of the river Jellangi (Kharia) in the District of Nadia, and Muktarpur No. 22 lying west of it in the District of Murshedabad. Muktarpur No. 17 has been found to belong to the appellant company. The question with respect of Muktarpur No. 22 turns upon the interpretation of the expression "Kharia Nadir hoddapar." The learned Judges relying on the meaning of the word *Hodd*, *Hadd* or *Hudd* which means boundary (see Wilson's Glossary, page 192) and the word *para*, or *Par*, which means "river bank," came to the conclusion that the grant was of land on one side of the river only and that the word *hoddapar* was used for the purpose of excluding from the grant the bank of the river. The boundaries given by the patnidar in his application for registration under S. 40 of Act 11 of 1859, in col. 6 of the common register are the boundaries of Char Muktapore which has now been found to belong to them. This is a definite indication that only Char Muktapore No. 17 was granted to the predecessors of the appellant company. Apart from this consideration, looking at the plan Ex. 10 (a), Settlement Map of Revenue Thana Naoda District Murshedabad, their Lordships find that Muktarpur No. 22 lies on the west separated from the river by a tract of land of some size. Two Muktarpurs lying in this situation, not contiguous with the river, would hardly be described as lands on both sides of the river. Their Lordships have no doubt that Muktarpur No. 22 was never granted to the predecessors of the appellant company.

There are no other questions for decision in this appeal as the other questions raised have not been pressed by the appellant company. The result is that this appeal will be dismissed with costs, but the decree passed by the High Court which their Lordships now confirm will also include in the decretal portion a provision which the High Court inadvertently omitted, viz., that the plaintiff be put into khas possession of Muktarpur Mauza J. L. No. 22 in district Murshedabad within

the jurisdiction of Naoda thana, District Murshedabad being No. 22 in register "C" referred to, mentioned in Sch. 3. Their Lordships will humbly advise His Majesty accordingly.

R.K. *Appeal dismissed.*

Solicitors for Appellant—*Burton Yeates & Hart.*

Solicitors for Respondents — *W. W. Box & Co.*

A. I. R. (32) 1945 Privy Council 128

(*From Oudh : A. I. R. ('40) 27 A. I. R. 1940 Oudh 269*)

7th May 1945

LORD THANKERTON, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT

Mt. Inder Kuer — Appellant

v.

Mt. Pirthipal Kuer and another —

Respondents.

Privy Council Appeal No. 3 of 1943; Oudh Appeal No. 11 of 1940.

(a) Hindu law — Joint family — Presumption.

The state of every Hindu family is presumed to be joint, joint in food, worship and estate; but the strength of the presumption necessarily varies in each case. The presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family, the presumption becomes weaker and weaker. The evidence in the case has to be reviewed in the light of this presumption. [P 129 C 2]

(b) Revenue records — Mutation — Value of evidence.

An order made in mutation proceedings is, no doubt, not a judicial determination of the title of the parties, but it has evidentiary value. [P 130 C 2]

(c) Hindu law—Partition — Separation can be proved by conduct of family and attendant circumstances.

For partition physical division of property is not necessary. Once the shares are defined there is a severance of joint status. The parties may then make a physical division of the property or they may decide to live together and enjoy the property in common. But the property ceases to be joint immediately the shares are defined and thenceforward the parties hold as tenants-in-common. Separation of family can be proved by the conduct of the family and the attendant circumstances: ('38) 25 A. I. R. 1938 P. C. 189, *Rel. on.* [P 131 C 1]

(d) Custom — Succession — Exclusion of sisters.

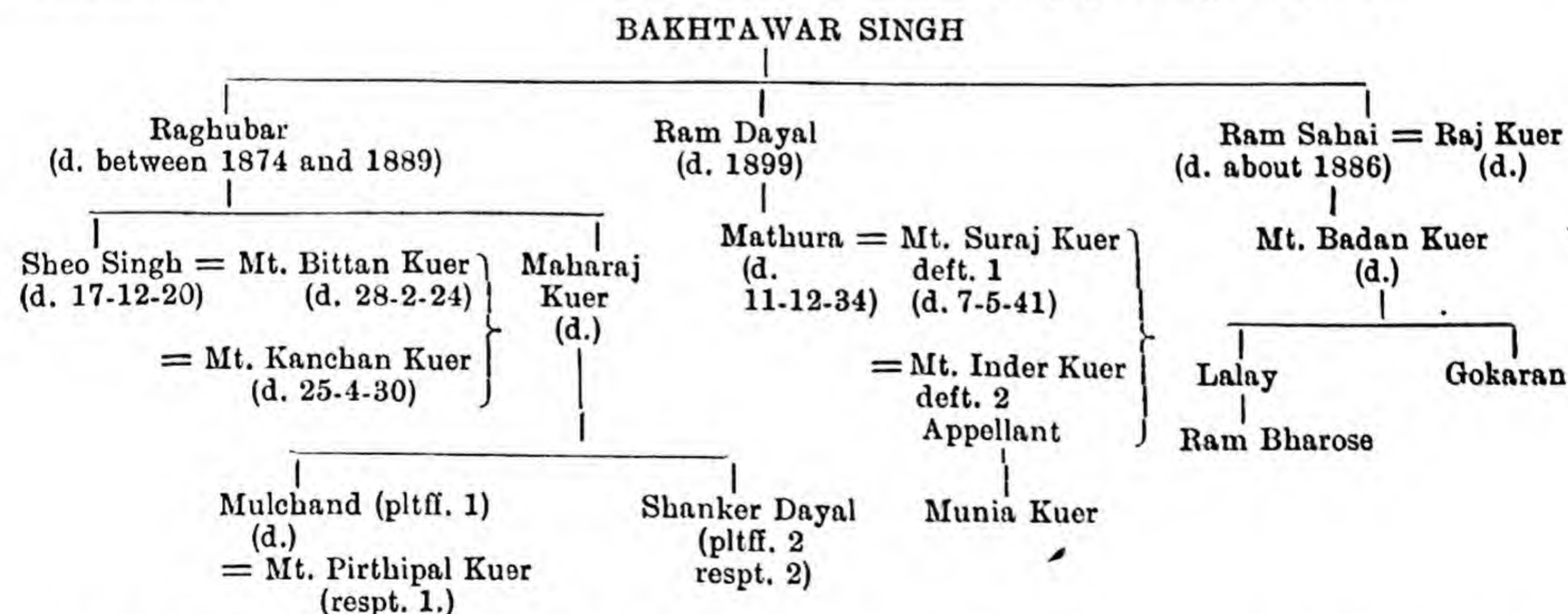
Custom of exclusion of sisters and their children by collaterals held not established. [P 132 C 2]

J. M. Pringle — for Appellant.

C. S. Rewcastle and L. M. Joplong —

for Respondents.

Sir Madhavan Nair.—This is an appeal from the decree of the Chief Court of Oudh dated 27th February 1940, which reversed the decree of the Civil Judge, Sitapur, dated 30th September 1936, and decreed the plaintiffs' suit. The appellant before the board was defendant 2 in the suit, the surviving widow of one Mathura Singh, deceased. The first and the only other defendant, her co-widow, did not join the appellant in filing this appeal. She was therefore made respondent 3. During the pendency of the appeal she died and her name was removed; and the appellant was made her heir and legal representative by the order of the Chief Court. The deceased husband of respondent 1, and respondent 2, were the original plaintiffs in the suit. They will be referred to as the respondents. The relationship of the parties to the suit is shown in the following genealogical table:



One Bakhtawar Singh, a Hindu, had three sons, Raghubar, Ram Dayal and Ram Sahai. Of these, Raghubar and Ram Dayal had each one son called respectively, Sheo Singh and Mathura Singh; and Raghubar had a daughter as well, whose sons were the plaintiffs in the suit. Sheo Singh died on 17th December 1920, without issue, leaving two widows, Mt. Bittan Kuer, who died on 28th February 1924.

and Mt. Kanchan Kuer, who died on 25th April 1930.

Mathura Singh, the cousin of Sheo Singh, died on 11th December 1934, leaving two widows—the defendants in the suit—of whom the surviving widow, defendant 2 is, as was stated before, the appellant. The appeal arises out of a suit instituted by the respondents for possession of the immovable properties men-

tioned in lists A and B of the plaint, under claim of being the heirs of Sheo Singh, the last full owner. They claimed the properties as Sheo Singh's separate estate, to which they as his sister's sons were entitled to succeed by virtue of S. 2, Hindu Law of Inheritance (Amendment) Act, 2 of 1929, (hereinafter referred to as "the Act"). The Act applies to persons otherwise subject to the law of the Mitakshara. Section 2 of the Act says that

"A son's daughter, daughter's daughter, sister and sister's son shall in the order so specified be entitled to rank in the order of succession next after a father's father and before a father's brother".

It will be observed that Mathura Singh, as the son of Sheo Singh's father's brother and ranking as such in the Mitakshara order of succession would, under the section, be postponed to the plaintiffs as sister's sons of Sheo Singh. The case of the respondents is that after the death of Sheo Singh, his widows Bittan Kuer and Kanchan Kuer, entered into joint possession of Sheo Singh's property, that on Bittan Kuer's death, Kanchan Kuer came into possession of the entire property, that on her death Mathura Singh took wrongful possession of the same, and that on his death his widows obtained wrongful possession against them. The appellant and her co-widow resisted the claim of the respondents on the alternative contentions, viz., (1) that the properties in suit were joint family properties which on Sheo Singh's death in 1920 passed by survivorship to their husband, and on his death in 1934, to themselves for a limited estate, and the appellant claims that on her co-widow's death they vested in herself alone; and (2) that even if the properties were the separate properties of Sheo Singh under the custom applicable to the family, Mathura Singh took as heir, the operation of S. 2 of the Act being excluded by S. 3 thereof. Section 3 is as follows:

"Nothing in this Act shall (a) affect any special family or local custom having the force of law."

The custom relied on by the appellant and her co-widow is thus stated in para. 21 of their joint written statement :

"It has been the custom in the family of Bakhtawar Singh and his descendants that in the presence of collaterals, daughters, their sons, or sisters and their sons, are excluded from inheritance. If there be no collateral then daughters, their issue, and after that sisters and their descendants become heirs."

On the above contentions two questions arose for decision in the Courts in India, and the same questions arise for decision also before the Board. These questions are : (1) Whether Sheo Singh and Mathura Singh were members of a joint Hindu family, or whether Sheo Singh died while separate from Mathura Singh, and (2) whether there is any custom in the family of Sheo Singh excluding sisters

and their issue if collaterals are in existence. In support of their respective contentions both parties gave evidence, both oral and documentary, on a consideration of which the learned Civil Judge answered both questions in favour of the appellant; the learned Judges of the High Court set aside his decision on both points.

As is usual in cases of this kind, the oral evidence is much interested and indefinite, and the documents by themselves are inconclusive. The case has to be decided on the evidence read as a whole. The burden of proving that Sheo Singh was separate in estate from Mathura Singh is on the respondents. It is well known that the state of every Hindu family is presumed to be joint, joint in food, worship and estate, but the strength of the presumption necessarily varies in each case. It has been laid down that the presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family, the presumption becomes weaker and weaker. The evidence in the case has to be reviewed in the light of this presumption. Sheo Singh and Mathura Singh, being cousins, the presumption of jointness may not be so strong as it would be had they been brothers.

The respondents have not been able to assign any definite date as regards the partition in the family of their uncle. They are only nephews of Sheo Singh who ordinarily may not be expected to know the details of his family affairs, though according to the evidence they had lived long in their uncle's family. Their counsel stated : (*see p. 13 of the records*) :

"Raghubar Singh, Ram Sahai, and Ram Dayal were separate. My client cannot give the date when separation took place, but it took place when the sons of Bakhtawar Singh were alive. The separation took place some time between the first regular settlement and the death of Ram Sahai. Raghubar was separate from before."

The settlement referred to is 1873, and Ram Sahai died in or about 1886. There is some evidence, not direct, bearing on the point, but it is not sufficient by itself to establish the truth of the counsel's statement. Their Lordships will refer to it later. In this connexion it is necessary to observe that though the respondents may not be able to prove the exact case of separation set up by them in their counsel's statement, they will be entitled to succeed in their case if they are able to prove to the satisfaction of the Court that Sheo Singh and Mathura Singh must have been separate in estate and that Sheo Singh died while separate from Mathura Singh, which is what they have really attempted to do, relying on the

evidence read as a whole to support that conclusion inferentially.

Their Lordships will first deal with the question whether Sheo Singh died while separate from Mathura Singh. After holding that separate devolution of shares in the properties, specification separately of the shares of Sheo Singh and Mathura Singh in the *khe-wats*, the fact that they held *sir*, *khudkasht* lands separately, that they held groves separately, that they had separate residences, that they executed separate powers of attorney and had separate servants and other factors, relied on by the respondents to show that Sheo Singh and Mathura Singh were separate in estate, were not necessarily inconsistent with the existence of a joint Hindu family, the learned Civil Judge concluded that the family was joint chiefly by reason of (1) the evidence of Mt. Suraj Kuer, defendant 1, taken on commission, (2) the evidence afforded by certain books of accounts, Exs. A37 to A40, and (3) the evidence that the income of the entire estate was collected by Sheo Singh alone in his life time. In support of the conclusion that the family was joint and was not divided Mr. Pringle, the learned counsel for the appellant, has taken their Lordships through most of the evidence in the case. Their Lordships will refer only to those salient features in the evidence which they think are sufficient to decide the point under consideration and will deal with the relevant objections thereto as they proceed.

In their Lordships' opinion evidence relating to devolution of properties in separate shares where such devolution happened, and the holding and management of properties in separate shares, are the most important evidence in this case on the question of separation. When Ram Sahai, one of the three sons of Bakhtawar, died in or about the year 1886, evidence shows that in two villages, his share was mutated in the name of his widow Raj Kuer to the exclusion of his brothers (*see* Exs. 22 and 23). Exhibit 22 shows that she was also the *lambardar* of the village of Bodhwa. It is said that these shares came back to the family but it is not shown in what circumstances. However, to the extent they go these documents would suggest that there may well have been a separation of shares before the death of Ram Sahai. It is not known whether Raj Kuer obtained the shares of her husband in the other three villages in which also he had shares. The learned Judges of the High Court say that all his property was mutated in the name of his widow but the evidence on record refers only to the above-mentioned two villages. Their Lordships agree that this evidence by itself

is not enough to establish the case of separation set up, but it requires explanation, and Mr. Pringle explains it by saying that the shares in question were given to her by way of consolation to the widow on the death of her husband. The learned Judges of the High Court say with reference to this plea that "it is well established that there is no presumption that mutation in the name of a Hindu widow is by way of consolation. Consequently whoever raises the plea of mutation being for consolation must prove it but in the present case there is no evidence worth the name in support of the defendants' allegation on this point."

This view has not been shown to be wrong. The learned Judges say further, that "the fact that Ram Sahai's and Sheo Singh's widows were *lambardars* in some of the villages knocks the bottom out of the plea of consolation."

The next instance of mutation to be noticed is the one that followed on the death of Sheo Singh, who died in 1920. The following extract is from the learned Civil Judge's judgment:

"The shares of the property of Sheo Singh and Mathura Singh were separately recorded in the *khe-wats*, and after the death of Sheo Singh his property was separately recorded in the names of his widows as appears from the *khewats* and *khetonis* (Exs. 27 to 34 and 37 to 39). The widows of Sheo Singh were also made *lambardars* of their share of the property (*vide* D. W. 10, p. 57)."

This instance of mutation strongly supports the view that Sheo Singh before his death must have become separate in estate from Mathura Singh for, if they were joint mutation would in the normal course be in the name of Mathura Singh and not in the name of the widows. In this connexion the High Court observes that

"the order of mutation having been passed by the *Tahsildar* shows that Mathura Singh did not even contest the widows' right to succeed to their husband."

Exhibit 17 shows that on Bittan Kuer's death the property standing in her name in village Tambour was mutated in favour of the surviving widow Kanchan Kuer, as stated by the *Tahsildar* "on the basis of inheritance." The mutation made in favour of the widows in the case of Sheo Singh's death also, is said to have been made by way of consolation without any proof that it had been so made. If that had been so made originally, on Bittan Kuer's death, why should her portion be mutated again in favour of Kanchan Kuer who had been given her specific portion already? An order made in mutation proceedings is, no doubt, not a judicial determination of the title of the parties, but that it has evidentiary value, cannot be disputed. It appears to their Lordships that the true explanation of what happened is this, that when their husband died the two widows succeeded to his estate as they would ordinarily do under

the Hindu law, and when one of them died, the other succeeded to the ordinary widow's estate in the whole of it, from which it would follow in the absence of a reasonable explanation that their husband died while separate from Mathura Singh. This is the real evidentiary value of the mutation proceedings in this case, and the learned counsel who has gone through the evidence with great care has not been able to give any satisfactory explanation of them except that the properties were given by way of consolation to the widows which is true neither in law nor in fact. The instances of succession which their Lordships have noticed are clearly inconsistent with the family being joint. Further, in several villages the widows were lambardars. They had separate servants for collection of rents and they filed suits for arrears of rents even in a village of which Mathura Singh was the lambardar. These facts are full of significance and support the view that Sheo Singh was separate from Mathura Singh before he died.

The above evidence does not stand alone. Another kind of evidence relates to the holding of the lands. There is evidence not only that the shares of Sheo Singh and Mathura Singh were specified in several khewats but also they held sir, khudkasht lands and groves separately. It is true that there is no evidence in this case of actual partition of the joint estate by metes and bounds, but physical division of property is not necessary. "Once the shares are defined there is a severance of joint status. The parties may then make a physical division of the property or they may decide to live together and enjoy the property in common. But the property ceases to be joint immediately the shares are defined and thenceforward the parties hold as tenants in common": (*See the decision of the Board in A.I.R. 1938 P. C. 189*¹).

The other relevant evidence indicative of separation such as, having separate residence, separate business, separate servants, separate cattle sheds, and others of a like nature which are important, have all been fully considered in the judgment of the High Court and need not be referred to again. It is well established that separation of family can be proved by the conduct of the family and the attendant circumstances; and their Lordships are of opinion that in this case there are strong circumstances proving the separation of the family. The cumulative effect of the evidence examined above is sought to be negatived mainly by referring to entries in the account books, A37 to A40, for the years 1914-15, 1915-17,

1918-20 and 1920-23, respectively, to show that the family remained joint. Their Lordships are not satisfied after an examination of the various entries brought to their notice that the account books represent accounts of the joint family; on the other hand they agree with the High Court that the evidence gives strength to the respondents' case that the accounts are the separate accounts of Sheo Singh. They may add that there is nothing in the evidence to show from what source the monies dealt with in the accounts came. The other documents brought to their Lordships' notice, such as A2, A42, A43, A45, are not for the reasons mentioned by the learned Judges necessarily inconsistent with the respondent's case. The evidence of defendant 1, the co-widow, taken on commission, distinctly supports the case of the plaintiff, that Sheo Singh and Mathura Singh were separate. Their Lordships do not attach much importance to the evidence that Sheo Singh collected the rent and paid the revenue on behalf of the co-sharers as he was the lambardar of many of the villages.

In their Lordships' opinion, the evidence surveyed as a whole including the oral evidence leads to the conclusion that the separation of estate in this family began from about the time of Ram Dayal's death and went on progressively till it culminated in effective separation between Sheo Singh and Mathura Singh before the death of Sheo Singh, and that Sheo Singh died while separate from Mathura Singh. It is difficult to ascertain definitely the date when the separation took place but that is not a defect as their Lordships are satisfied from the evidence that it did take place before the death of Sheo Singh. The learned counsel for the respondents state that the separation took place at or about the year 1900, judging from the entry in col. 3, headed period of cultivation, "20 years from 1309 Fasli" noted against Thakur Sheo Singh, "proprietor", an Ex. 27, an extract from the khetauni of village Tambur, but it is difficult having regard to the nature of the evidence to assign any exact date, nor is it necessary to do so in the circumstances of this case.

In view of the finding that Sheo Singh died while separate from Mathura Singh, the appellant cannot succeed unless the alleged custom of exclusion of sisters and their children by collaterals is established, which is the next question for consideration. In support of this custom the appellant and her co-widow relied in the Courts below mainly on the "wajibularz" of Isapur village—Ex. 41, dated 1873. Paragraph 4 of the wajibularz runs as follows:

1. ('38) 25 A.I.R. 1938 P. C. 189 : 32 S. L. R. 798: 175 I. C. 332 (P.C.), *Harkishan Singh v. Partap Singh*.

"The custom obtaining in the family of the zamindars of this village is that on the death of any co-sharer, if there be any male issue and widow, the male issue get the heritage in equal shares and the widow, food and raiment If there be no male issue, the real brothers shall be the heirs, generation after generation, and shall support the widow. If even real brothers be not in existence, then the widow shall remain the heir for life. If there be two or more widows, they shall be the owners in equal shares. In the event of the widow becoming immoral, she shall be deprived of the share. If there be no widow even, then the nearest among the collateral relations of the widow's husband shall get the share and if even he be not forthcoming, then the daughter and her issue and sister and sister's issue shall be the heirs"

The wajib-ul-arz has been attested by Ram Sahai, Raghubar Singh, Ram Dayal and other cosharers of the village. The learned Judges held that the above paragraph of the wajib-ul-arz can hardly be taken as a custom for the reasons that, (1) on Ram Sahai's death his property devolved on Raj Kuer, and not on his brother Ram Dayal, (2) wajib-ul-arzes are often untrustworthy as they record not custom but the wishes of those who dictate them, (3) in the present case there is no satisfactory evidence that the clause records a custom, (4) none of the witnesses examined could cite a single instance of the application of the custom, and (5) it is difficult to see how there could have been a custom of exclusion of sisters when sisters were no heirs at all prior to the passing of Act 2 of 1929. The learned Judges had before them another wajib-ul-arz—Exhibit A-2—"which contained no such provision relating to the succession of sisters as is contained in the wajib-ul-arz of Isapur." They therefore held that the custom set up was not proved.

The printed records show that Ex. A-2 is a translation of an extract from the wajib-ul-arz of the village Ismailganj, in which also, the predecessors of the parties were cosharers, containing only paras. 1, 3, 13 of the wajib-ul-arz. The extract is a certified copy issued by the copying department of the Sitapur Collectorate. It does not contain para. 4 of the wajib-ul-arz or any reference to the alleged custom. A translation of the original wajib-ul-arz of Ismailganj containing all the paragraphs has now been brought to their Lordships' notice by the respondents, included in the "supplementary record." It contains para. 4 of the wajib-ul-arz styled "relating to right of inheritance." Normally, their Lordships will not at this stage take this document into consideration, without having the question of its admission considered by the High Court, but the appellants' learned counsel, though he objected to the manner in which it has been brought to their notice without the usual formal application for admission of the docu-

ment, has agreed that he has no objection to their Lordships treating it as admitted. Their Lordships are surprised that the learned Judges of the High Court were led to think that there was no reference to the right of inheritance in the wajib-ul-arz of Ismailganj. The trial Court does not in this connexion refer to this exhibit. Paragraph 4 "relating to inheritance" of this wajib-ul-arz runs as follows :

"A daughter" and her issue are not entitled to inheritance and a childless widow whose husband's share was separate and whose husband used to get rendition of accounts only, is entitled to inheritance and possesses powers of transfer also. In case the share is divided but no rendition of account is made she (the widow) holds the share without power of transfer and after her that share devolves on the lawful heir. In case there are male "issue from several wives, then division of share takes place on the number of wives. A woman who is not lawfully wedded and her issue have no right whatsoever. She gets maintenance (food and raiment) as long as she remains alive." (The rest of the paragraph omitted refers to the custom of adoption; and of the rights of an adopted son and the son born after adoption.)

The above paragraph does not contain any reference to inheritance by sisters and their sons at all, and in that respect is not in conformity with the custom contained in para. 4 of the wajib-ul-arz of Isapur, which excludes sisters and their children in the presence of collaterals. As already stated, the predecessors of the parties to the suit were cosharers in both the villages. In an appropriate case like the present what is the rule of inheritance to be applied according to the custom of the family? In view of the inconsistent statements contained in these two documents as regards the right of inheritance their Lordships hold without any further consideration of the question which seems to them to be unnecessary in the circumstances, that the alleged custom set up by the appellant and her co-widow has not been established. In the result, their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

R.K. *Appeal dismissed.*
Solicitors for Appellant — *Lambert & White.*
Solicitors for Respondents — *Hy.S.L. Polak & Co.*

A. I. R. (32) 1945 Privy Council 132
(From : Nagpur)

29th May 1945

LORD THANKERTON, SIR MADHAVAN
NAIR AND SIR JOHN BEAUMONT
Rao Sobhagsingh — Appellant

v.

Rao Ranjitsingh — Respondent.
Privy Council Appeals Nos. 47 and 48 of 1943.

Civil P. C. (1908), S. 11, Explan. 4.—In previous suit between same parties plaintiff claiming half share in entire income from offerings made to idol—Plaintiff's title upheld—Defence in subsequent suit that plaintiff was entitled to half share in income of one portion only of offerings held barred under S. 11, Explan. 4.

In the previous suit between the same parties the plaintiff claimed that he was entitled to one half of the entire income from the offerings made by pilgrims to the idol of Shree Onkarji at the time of certain annual fairs. The plaintiff's title to one half of the entire income was upheld. In the subsequent suit the plaintiff claimed a half share in the income from entire offerings made at subsequent annual fairs :

Held that the defence in the subsequent suit that the plaintiff was entitled to a half share in the income of only one portion of offerings, namely, the shamlat khut or joint account, was a matter which might and ought to have been made a ground of defence in the previous suit and was therefore to be deemed to have been a matter directly and substantially in issue in the previous suit within the meaning of Explan. 4 to S. 11. The defence in the subsequent suit therefore was barred by S. 11, Explanation 4. [P 133 C 2]

Civil P. C. —

('44) Chitale, S. 11, N. 35, Pt. 4; N. 37, Pts. 1, 2.

('41) Mulla, Page 48, Pts. (c), (f), (g) ; Page 50, Pt. (k).

Sir Thomas Strangman and S. P. Khambatta—
for Appellant.

Respondent Ex parte.

Lord Thankerton. — These are consolidated appeals from a judgment and two decrees of the Court of the Additional Judicial Commissioner, Central Provinces, dated 31st August 1935, which set aside the judgment and two orders of the District Judge, Nimar, dated 2nd January 1931, and restored the judgment and two decrees of the Subordinate Judge, Khandwa, dated 25th June 1930. The respondent, who is plaintiff in both suits, did not appear in these appeals. The appellant was defendant in both suits, in which the plaintiff claims a half share in the income of the offerings made by pilgrims to the idol of Shree Onkarji at the time of certain annual fairs at Mandhata. The first suit, No. 32 of 1924, relates to the Kartiki fair of 1920, and the second suit, No. 45 of 1925, relates to the Kartiki and Sheoratri fairs of 1923 and Baishakhi fair of 1924. The plaintiff claims in both suits a half share of the income from the entire offerings; the defendant contends in both suits that he is entitled to a half share in the income of one portion only of the offerings, namely, the Shamlat khut or joint account. By the judgment under appeal the Additional Judicial Commissioner has held that the defendant is excluded from maintaining that defence as the matter is *res judicata*, and their Lordships may say at once that they are of opinion that the decision of the Additional Judicial Commissioner is correct, though they will state the reasons somewhat differently. In this view,

any consideration of the merits of the defence cannot arise.

There were two previous suits between the same parties which are relevant to the question of *res judicata*. The first of these was No. 46 of 1913, afterwards renumbered No. 9 of 1917, in which the present plaintiff's father was plaintiff and claimed half of the income from offerings of 91 fairs from Samvat 1940, that is 1883 A. D., to the Baisakhi fair of Samvat 1970, that is 1913 A. D. The plaintiff only had lists of the income of forty-three of the 91 fairs, which he filed. Their Lordships find it unnecessary to go through the proceedings in detail, as the present appellant's counsel admitted that the present defence was not stated and, in the opinion of their Lordships, it is clear that the case proceeded on the footing that the plaintiff was entitled to one-half of the whole income subject to the question of certain deductions to be made before division, which were the subject of dispute, and which are not now material. In his judgment dated 15th May 1918, the Subordinate Judge held that the burden of proving the income lay on the plaintiff, that Art. 62 of the Limitation Schedule applied, and that the plaintiff could only claim for the period within three years previous to the suit, and was entitled to get his share of the offerings received on or after 25th October 1910, which involved the income of nine fairs, but that the income of only four of these had been proved, and that it was absorbed by a prior deduction, thus leaving no balance due to the plaintiff. This means that the plaintiff's title to one-half of the whole income, after the proper deductions had been made, was judicially upheld, and the present defence of the defendant was a matter which might and ought to have been made ground of defence in the previous suit, and is therefore to be deemed to have been a matter directly and substantially in issue in such suit, within the meaning of Explan. 4 to S. 11, Civil P. C. The learned District Judge declined to come to that conclusion, on the ground that an examination of the lists filed in respect of 43 fairs showed that the income recorded was confined to Shamlati or joint account. He therefore concluded that the claim as well as the judgment was concerned only with such income, and it was therefore unnecessary for the defendant to state his present defence. Their Lordships are unable to agree with this view, for, in their opinion, the plaintiff clearly claimed his share of the whole income, the lists filed being incomplete, and it was only because he failed to prove more than the income of four fairs that he failed to prove a balance due to him. On appeal, the Additional Judicial Commissioner held that the decision

of the District Judge on *res judicata* was incorrect, and that at any rate in one of the former suits the plaintiff clearly claimed a half of the whole income, and the question whether he was entitled to a half share of the income was put in issue and decided. The learned Judge referred specially to the plaint in the second suit No. 64 of 1918, and to the judgment in that suit. This second suit was instituted by the present plaintiff's father on 20th September 1918, against the present defendant in respect of four fairs in 1913 and 1914, which had been omitted in the previous suit, but which had been the subject of a private arrangement for calculating and keeping the income of these four fairs pending the decision of the previous suit. This suit was raised under reference to the decision in the previous suit. The Subordinate Judge gave judgment on 30th September 1919, the suit being decreed in terms of the compromise arrived at between the parties. There is no mention in the pleadings of the defence now stated by the defendant. In their Lordships' view, the question of the plaintiff's title having become *res judicata* in the previous suit, this second suit was a corollary thereto for the recovery of sums not claimed in the previous suit, and the decision of the Additional Judicial Commissioner would have been more correctly based on the previous suit. Accordingly their Lordships are of opinion that the decision of the Additional Judicial Commissioner that the defendant's present defence was excluded by *res judicata* was correct, and they will humbly advise His Majesty that the consolidated appeals should be dismissed.

G.N. *Appeals dismissed.*
Solicitors for Appellant—*T. L. Wilson & Co.*
Respondent Ex parte.

A. I. R. (32) 1945 Privy Council 134
(*From: Bombay*)
29th May 1945

LORD MACMILLAN, LORD GODDARD AND
SIR MADHAVAN NAIR.

Parashuram Detaram Shamdasani,
Appellant

v.

Emperor.

Privy Council Appeal No. 23 of 1944.

(a) Contempt of Court — Definition given —
Insult to counsel is not—Summary power when
should be used, explained.

For words or action used in face of the Court, or in the course of proceedings, for they may be used outside the Court, to be a contempt, they must be such as would interfere or tend to interfere with the course of justice. It must be rare indeed for words used in the course of argument, however irrelevant, to amount to a contempt when they relate to an oppo-

nent, whether counsel or litigant. An insult to counsel or to the opposing litigant is very different from an insult to the Court itself or to members of a jury who form part of the tribunal. [P 135 C 2]

The summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a Court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended. [P 136 C 1,2]

S, while appearing in person to support his objections remarked "I do not keep anything back at all. My fault is that I disclose everything, unlike members of the bar, who are in the habit of not doing so and misleading the Court". This caused a protest from the opposing counsel, whereupon S immediately apologised and expressed his regret for having used an unfortunate expression in the heat of argument:

Held that the words used by S respecting the bar, and which must be taken to have been intended by him to refer to the opposing counsel in particular, did not and could not amount to a contempt of Court. [P 136 C 1]

(b) Privy Council — Costs — Contempt case — Crown was ordered to pay costs.

Where the Crown appears to uphold a conviction in a criminal case it is not the practice to award costs to the appellant in the event of the appeal succeeding. But, in a matter of a criminal contempt, it obviously is in a different category from an ordinary criminal case, if in spite of the emphatic opinion of the Chief Justice and another Judge of the Court of which the appellant was alleged to be in contempt that no contempt had been committed, the executive deems it necessary not only to appear but has endeavoured to uphold this order. The appellant should have the costs of the appeal. [P 136 C 2]

W. W. K. Page — for Appellant.

J. Millard Tucker and B. J. MacKenna —
for the Crown.

Lord Goddard.—This is an appeal from an order of the High Court of Bombay made by Kania J. adjudging that the appellant was guilty of a contempt of Court, committing him to prison for three months, and ordering him to pay a fine of Rs. 1000. On the day after the order was made, the appellant applied to the learned Judge for a modification of the sentence expressing sincere and unreserved regret for having used the expressions which were held to be a contempt, and the sentence was then reduced to one of eight days' imprisonment but no alteration was made in the fine. The sentence of imprisonment was served and the appellant then applied to the High Court in its appellate criminal jurisdiction for a certificate that the case was one fit for appeal to His Majesty in Council under cl. 41 of the Amended Letters Patent of 1865. This application was opposed by the Advocate-General, who submitted there was no jurisdiction to grant it, as it was said that the clause in question did not apply to a committal for contempt of Court. The High Court (Beaumont C. J. and Sen J.) held that

there was jurisdiction to grant a certificate and that it was a proper case in which to do so, and this was accepted as right by counsel for the respondent before this Board, and their Lordships accordingly do not think it necessary to express any opinion upon this matter. The appellant had been an unsuccessful plaintiff in a suit in the High Court and had been ordered to pay costs. They were taxed and the appellant then took out a summons to review the taxation, and, though a layman, appeared in person to support his objections. In the course of the hearing, counsel opposing stated that the appellant was misleading the Court as to the nature of the issues raised in the action and insisted that he should read out a paragraph in the plaint. The appellant then said: "I do not keep anything back at all. My fault is that I disclose everything, unlike members of the Bar, who are in the habit of not doing so and misleading the Court." This caused a protest from the opposing counsel, Mr. Desai, whereupon the appellant immediately apologised and expressed his regret for having used an unfortunate expression in the heat of argument. Later in dealing with the Taxing Master's statement, with regard to the allowance of discretionary items, that he had taken into consideration all the matters mentioned in R. 563, the appellant said: "It is customary for the Taxing Masters to write what is written at the end of the paragraph, but is it considered at all?" No protest or observation on this statement was made either by Bench or Bar at the time when it was uttered, nor when judgment was given, and it appears to their Lordships that it must have been regarded as no more than the sort of tactless and intemperate statement that is not infrequently made in the heat of argument and not only by litigants in person. On 13th October 1942, the appellant concluded his argument and the Court proceeded to give judgment but had not finished doing so at the end of the day. At the rising of the Court Mr. Desai stated that he would draw the attention of the Court to the statement made by the appellant with reference to the Bar and would apply that appropriate action be taken. On the next day both Mr. Desai and the Advocate-General of Bombay appeared, and, though the appellant again apologised and expressed regret for what he had said, moved the Court to punish the appellant for a contempt in using the language he did regarding the Bar. In the course of the argument the learned Judge himself then raised the question as to the words the appellant had used relating to the Taxing Masters. On the following day the learned Judge delivered a lengthy judgment, reviewing some authorities,

and, coming to the conclusion that the appellant had been guilty of a contempt both in his reflections on the Bar and on the Taxing Masters, made the order against which this appeal is brought.

Dealing first with the appellant's reference to the conduct of the Bar, their Lordships share the surprise expressed by the Chief Justice when granting the certificate for appeal as to what he described as the somewhat undue degree of sensitiveness displayed in taking so serious a view of what had been said. Their Lordships would indeed go further and say that it would have been more consonant with the dignity of the Bar to have ignored a foolish remark which has been made over and over again not only by the ignorant, but by people who ought to know better, and no doubt will continue to be made so long as there is a profession of advocacy. To treat such words as requiring the exercise by the Court of its summary powers of punishment is not only to make a mountain out of a molehill but to give a wholly undeserved advertisement to what had far better have been treated as unworthy of either answer or even notice. But apart from the question of whether the motion was wise or expedient, it has to be decided whether these words could be properly regarded as a contempt of Court. The principle to be applied is clear enough. For words or action used in face of the Court, or in the course of proceedings, for they may be used outside the Court, to be a contempt, they must be such as would interfere or tend to interfere with the course of justice. No further definition can be attempted. It must be rare indeed for words used in the course of argument, however irrelevant, to amount to a contempt when they relate to an opponent, whether counsel or litigant. If in the course of a case a person persists in a line of conduct or use of language in spite of the ruling of the presiding Judge he may very properly be adjudged guilty of contempt of Court, but then the offence is the disregard of the ruling and setting the Court at defiance. So also if a litigant or an advocate threatened or attempted violence on his opponent, or conceivably if he used language so outrageous and provocative as to be likely to lead to a brawl in Court, the offence could be said to have been committed. An insult to counsel or to the opposing litigant is very different from an insult to the Court itself or to members of a jury who form part of the tribunal. Their Lordships mention this matter because their attention was drawn to the case in (1864) 5 B. & S. 299,¹ where a member of the Bar

1. (1864) 5 B. & S. 299 : 33 L. J. M. C. 142 : 10 L. T. (N.S.) 376 : 12 W. R. 823, Ex parte Pater.

was adjudged guilty of contempt by the Middlesex Quarter Sessions and fined for insulting a jurymen and persisting in his conduct when reproved by the Deputy Assistant Judge. The Court of Queen's Bench refused to interfere and would not grant a certiorari to quash the order saying they could not act as a Court of Appeal from the Sessions. But it is quite clear that the Court's refusal was based on the fact that there was evidence of conduct which could amount to contempt, and the Court held itself free to inquire whether the inferior Court had reasonable grounds for adjudging that a contempt had been committed. Their Lordships think it unnecessary for them to deal with the cases in (1821) 4 B. & Ald. 329² and 1 Hogan 138³ on which Kania J. relied, as the judgment of Beaumont C. J. has already shown that they do not support the propositions that the learned Judge thought they did, and the Board entirely agree with the Chief Justice. In their Lordships' opinion, the words used by the appellant respecting the Bar, and which must be taken to have been intended by him to refer to Mr. Desai in particular, did not and could not amount to a contempt of Court, and, consequently, there was no jurisdiction in the learned Judge to exercise his summary powers in respect of them.

With regard to the words relating to the Taxing Masters, no doubt if a litigant were to suggest in Court that its officers were corrupt or habitually failed to carry out their duties the Court might consider it a contempt, though if it were only the latter that was suggested it would be unwise to do so. But when all the circumstances here are considered, and especially that when the words were uttered there was no reproof or even comment from the Bench it is impossible to suppose that they were treated or indeed intended as more than a tactless way of suggesting that Taxing Masters were apt to deal somewhat summarily with such matters as were then in question. It was not till the Advocate-General was moving for punishment on the appellant in respect of the other words that any notice seems to have been taken of the matter and then by the Judge himself, somewhat late in the day as it seems to their Lordships. In their opinion they afford no reasonable grounds for adjudging the appellant guilty of so grave an offence as contempt of Court, and on this point also their Lordships are glad to find that their opinion and that of the Chief Justice and Sen J. coincide. Their Lordships would once again emphasise what has often been said before, that this summary power of

punishing for contempt should be used sparingly and only in serious cases. It is a power which a Court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended. The Bar can surely maintain its dignity and prestige without having to invoke this jurisdiction.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the order of the learned Judge set aside. It should have been said that originally the Chief Justice and other Judges of the High Court were made respondents to this appeal. It was afterwards realised that this was incorrect and by an Order in Council dated 27th October 1944, the Crown was substituted as respondent. Where the Crown appears to uphold a conviction in a criminal case it is not the practice to award costs to the appellant in the event of the appeal succeeding. Although this matter is one which is known as a criminal contempt it obviously is in a different category from an ordinary criminal case. It is a matter of some surprise to their Lordships that in spite of the emphatic opinion of the Chief Justice and another Judge of the Court of which the appellant was alleged to be in contempt that no contempt had been committed the executive should have deemed it necessary not only to appear but to have endeavoured to uphold this order. In these circumstances their Lordships are of opinion that the appellant should have the costs of this appeal.

R.K.

Appeal allowed.

Solicitors for Appellant — *Sanderson Lee & Co.*

Solicitors for Respondent —

Solicitor, India Office.

A. I. R. (32) 1945 Privy Council 136
(From : North-West Frontier Province)

23rd January 1945

LORDS THANKERTON, SIMONDS AND
GODDARD, SIR MADHAVAN NAIR AND
SIR JOHN BEAUMONT

K. B. Mian Feroz Shah — Appellant
v.

*Firm R. S. Hira Singh Attar Singh and
others — Respondents.*

Privy Council Appeal No. 22 of 1944.

Practice — Privy Council — Special leave for appeal to—Leave granted by High Court invalid—Appellant held should be given opportunity to make out case for special leave to appeal.

Where the leave for appeal to Privy Council granted by the High Court is found to be invalid as the requisite matter of ascertainment of subject-matter of suit and appeal had not been properly approached,

2. (1821) 4 B. & Ald. 329, R. v. Davison.

3. 1 Hogan 138, French v. French.

the result would be dismissal of appeal with costs. But in view of the interests of parties and the possible saving of expense the appellant was given an opportunity to make out case for special leave to appeal. [Special leave was however refused on merits.]

[P 137 C 1]

C. P. C. —

('44) Chitaley, S. 112, N. 2 Pt. 1; N. 4; O. 45, R. 3, N. 2 Pt. 2.

('41) Mulla, page 390 Pt. (r).

J. M. Parikh and S. P. Khambatta —

for Appellant.

C. S. Rewcastle and S. Hyam — for Respondents.

Lord Thankerton. — Their Lordships have carefully listened to the grounds argued by counsel for the appellant and have come clearly to the conclusion that no valid leave was granted in this case because the requisite matter of ascertainment of the market value of the subject-matter of the suit and of the appeal had never been properly approached in any sense by the Court of the Judicial Commissioner prior to their granting the order giving leave. The result of that would necessarily have been that the appeal should be dismissed with costs, but, bearing in mind the interests of the parties and the possible saving of expense, their Lordships thought it right to invite Mr. Parikh to open so far on his case so as to give some idea whether there would be any possibility of his succeeding in the alternative method of a petition for special leave to appeal.

After having heard Mr. Parikh on the matter, their Lordships are fully satisfied that this is not a case in which there would be any possibility of their Lordships advising that special leave to appeal should be granted. Accordingly, it follows that their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

G.N.

Appeal dismissed.

Solicitors for Appellant — T. L. Wilson & Co.

Solicitors for Respondents — Barrow Rogers & Nevill.

* * A. I. R. (32) 1945 Privy Council 137

(From Bombay: ('42) 29

A. I. R. 1942 Bom. 50)

29th May 1945

LORD CHANCELLOR, LORDS MACMILLAN,
SIMONDS AND GODDARD, AND SIR
MADHAVAN NAIR

Commissioner of Income-tax, Bombay,
Sind and Baluchistan — Appellant
v.

P. E. Polson — Respondent.

Privy Council Appeal No. 39 of 1944.

** (a) Income-tax Act (1922, as amended by Amendment Act of 1939), S. 25 (3) — "Discontinued" means complete cessation and does not include discontinuance by transfer or assign-

1945 K/18

ment: I. L. R. (1942) Bom. 216=('42) 29 A. I. R. 1942 Bom. 50=198 I. C. 430, REVERSED.

The word "discontinued" in S. 25 (3) means only a complete cessation of the business and does not include the case of discontinuance of the business by the person formerly carrying it on as the result of the transfer or assignment of that business to another person who thereafter carries it on: ('43) 30 A. I. R. 1943 Mad. 504, *Approved*; I. L. R. (1942) Bom. 216=('42) 29 A. I. R. 1942 Bom. 50=198 I. C. 430, REVERSED. [P 137 C 2; P 140 C 2]

(b) Income-tax Act (1922, as amended in 1939), S. 25 (4) — "At the commencement of" means not earlier than 1st April 1939.

The words "At the commencement of" the amending Act, mean the date when the Act comes into force, i. e., on 1st April 1939; they cannot mean any earlier date. [P 139 C 2]

(c) Income-tax Act (1922, as amended in 1939), S. 25 (3) and (4) — Intention of amendment explained.

Under the unamended Act, relief was given in respect of a business, which had been taxed under the 1918 Act, only when it was discontinued. It was thought desirable to extend this relief to the case where there was not a discontinuance but there was a succession. Thus, upon a transfer the transferor or predecessor would get the same relief as he would have got if the business had been discontinued. This provision is made by the new sub-s. (4). But such relief can be given once only in respect of a business. Therefore, when the owner, who transfers, has got relief under sub-s. (4), it would not be right for the transferee to get relief under sub-s. (3) if and when the business is discontinued. For this reason the words "then unless there has been a succession by virtue of which the provisions of sub-s. (4) have been rendered applicable" are interpolated in sub-s. (3). [P 139 C 2]

(d) Income-tax Act (1922, as amended in 1939), Ss. 25 and 26 — Scope of, explained.

Sections 25 and 26 form part of a single scheme and their interaction must not be ignored. Section 26 is primarily directed not to the circumstances in which relief from taxation is given but to the apportionment of tax where relief is not given. [P 140 C 1]

J. Millard Tucker and S. P. Khambatta —
for Appellant.

Roland Burrows and L. M. Jopling —
for Respondent.

Lord Simonds. — This appeal, which is brought from a judgment of the High Court of Judicature at Bombay, raises a difficult question of Indian income-tax law upon which different views have been expressed by the High Courts of Bombay and Madras. The question can be briefly stated. It is whether the word "discontinued" in S. 25 (3), Income-tax Act, 1922 (hereinafter called "the 1922 Act"), as amended by the Income-tax (Amendment) Act, 1939 (hereinafter called "the amending Act"), means only a complete cessation of the business or whether it also includes the case of discontinuance of the business by the person formerly carrying it on as the result of the transfer or assignment of that business to another person who thereafter carries it on. In the case under appeal the High Court at Bombay (Beaumont C. J. and Kania J.) has

given the wider meaning to the word. In (1943) 11 I. T. R. 247¹ the High Court at Madras has given it the narrower meaning.

The respondent P. E. Polson had from some date before 1922 until 1st January 1939, carried on business in coffee, butter, flour and casein under the style of Polson Manufacturing Company. He had made profits and been charged to tax under the Income-tax Act, 1918. On 1st January 1939, he assigned the business to Polson Ltd., which thereafter carried it on. Part 1 of the amending Act which includes the amendments of ss. 25 and 26 of the 1922 Act, came into force on 1st April 1939, by virtue of Notification No. 7 of the Central Government dated 18th March 1939. In May 1939, the Income-tax Officer, Companies Circle, Bombay, issued a notice to the respondent under s. 22 (2) of the 1922 Act for the assessment year 1939-40, and, on 4th August 1939 the respondent made a return which contained an item of Rupees 1,64,726 in respect of income from his business for the previous year, i. e., the year 1938. Before any assessment was made he submitted a revised return showing "Nil" under all items. As his covering letter showed he based this return upon a claim to be entitled to the benefit of the provisions of s. 25 (3) of the 1922 Act as amended by the amending Act. This claim was rejected by the Income-tax Officer who on 29th November 1939 passed an order under s. 23 (3) of the 1922 Act assessing the respondent to tax on a total income which included the item of Rs. 1,64,726 in respect of the business. The respondent appealed to the Appellate Assistant Commissioner who by an order passed on 30th March 1940, dismissed the appeal. The respondent thereupon applied to the Commissioner of Income-tax, Bombay, Sind and Baluchistan, to review the assessment or to refer to the High Court for its decision the following questions of law:

"1. Whether on the facts of the case your petitioner [the respondent] is entitled to the benefit of s. 25 (3), Income-tax Act ?

2. Whether in view of the provisions of the said s. 25 (3) no tax is payable by your petitioner [the respondent] in respect of his income from business of Polson Manufacturing Company for the calendar year 1938 liable to assessment in respect of the financial year 1939-40 ?"

The Commissioner, expressing his own opinion that the respondent was not entitled to any relief under the section, on 20th June 1941, duly referred the case to the High Court at Bombay. That Court on 1st October 1941 delivered judgment answering both questions in the reference in the affirmative. It is

1. ('43) 30A. I. R. 1943 Mad. 504 : I. L. R. (1944) Mad. 166 : 212 I. C. 612 : (1943) 11 I. T. R. 247, *Meyyappa Chettiar v. Commissioner of Income-tax, Madras*.

from this judgment that the Commissioner of Income-tax appeals, contending that the respondent is not entitled to the relief claimed and that the referred questions should be answered in the negative. It is now necessary to refer to certain provisions of the Indian Income-tax Acts upon the interpretation of which this case depends. It must in the first place be borne in mind that under s. 3, Income-tax Act, 1922 (which in this respect differs from the English Income tax Acts), the subject of charge is not the income of the year of assessment but the income of the previous year. This was a change introduced by the 1922 Act. Previously, under the 1918 Act, the subject of charge was the actual income of the year of assessment. The result of this change was that, if a business was in existence and earning profits in the year 1921 when the 1918 Act was in force and continued in existence in the year 1922 when the 1922 Act was in force, the owner would pay income-tax twice over on his 1921 profits. It was accordingly necessary in the 1922 Act to differentiate for the purpose of discontinued businesses between those which had, and those which had not, been charged to tax under the 1918 Act. Section 25 of the 1922 Act deals with assessment in the case of discontinued businesses. By sub-s. (1) it provides that, where any business on which income-tax was not at any time charged under the provisions of the 1918 Act is discontinued in any year, an assessment may be made in that year on the basis of the income, profits or gains of the period between the end of the previous year and the date of such discontinuance in addition to the assessment, if any, made on the basis of the income, profits or gains of the previous year. This sub-section does not apply to the present case, but reference may be made to it as illustrating the purpose of the Act to make the number of assessments agree with the number of years during which the business has been carried on. Sub-section (2) of s. 25 is an administrative provision. It is upon sub-s. (3) that this appeal turns. Before the amending Act of 1939 came into force it was in the following terms:

"(3) Where any business, profession or vocation . . . on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is discontinued, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of

the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

The purpose and effect of this sub-section is clearly to give relief to a tax-payer who but for it would in the aggregate be charged with tax once in respect of every year's income and twice in respect of one year's income. Section 26 of the 1922 Act deals by sub-s. (1) with assessments where at the time of making the assessment it is found that a change has occurred in the constitution of a firm and by sub-s. (2) with assessments where at the time of making the assessment it is found that there has been a succession. It is a section which distributes a tax already charged as between old and new members of a firm or between the predecessor and the successor in a business. In its original form it provides that in the case of a succession the assessment shall be made on the successor as if he had been carrying on the business throughout the previous year and had received the whole profits for that year.

Before the amending Act came into force, the words "discontinued" and "discontinuance" in S. 25 of the 1922 Act had been the subject of numerous decisions in the Courts of India, amongst them, 50 Bom. 87,² (1929) 3 I. T. C. 341³ and (1938) 6 I. T. R. 290⁴ and it had been uniformly decided that these words did not cover mere change of ownership but referred only to a complete cessation of the business. Their Lordships entertain no doubt of the correctness of these decisions, which appear to be in accord with the plain meaning of the section and to be in line with similar decisions upon the English Income-tax Acts. Nor has their correctness been challenged in the judgment under appeal or in the argument before their Lordships.

It has however been contended that the amendments introduced by the amending Act impose a different interpretation upon S. 25 and it is this contention that has been accepted by the High Court at Bombay. The amendments so introduced are as follows: Section 25 (1) and (2) are not touched. Into S. 25 (3) after the word "discontinued" there are interpolated the words "then, unless there has been a succession by virtue of which the provisions of sub-s. (4) have been rendered applicable." A new sub-s. (4) is introduced which is in the following terms:

2. ('26) 13 A. I. R. 1926 Bom. 129 : 50 Bom. 87 : 92 I. C. 517, Commissioner of Income-tax, Bombay v. Sanjana & Co. Ltd.

3. ('29) 16 A. I. R. 1929 Lah. 461 : 117 I. C. 228 : (1929) 3 I. T. C. 341, Kalu Mal Shori Mal v. Commissioner of Income-tax, Punjab.

4. ('38) 6 I. T. R. 290 (Pat.), Hunutram Bhuramal v. Commissioner of Income-tax, B. and O.

(4) Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939, carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and, if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

A new sub-s. (5) is also introduced but it is not relevant to the present question. Consequential amendments are made in sub-s. (6). Section 26 has also been substantially amended, but it is convenient to pause and examine the amendments to S. 25 before turning to S. 26. It must first be noted that the new sub-s. (4) of S. 25 has no application to the respondent. On 1st January 1939, he ceased to be the owner of the business. Therefore he was not carrying it on "at the commencement of" the amending Act. *Prima facie*, these words mean the date when the Act comes into force, i. e., on 1st April 1939. It is at any rate clear that they cannot mean any earlier date.

The scheme of the amendment may then be observed. It is clear enough. Under the unamended Act, relief was given in respect of a business, which had been taxed under the 1918 Act, only when it was discontinued. It was thought desirable to extend this relief to the case where there was not a discontinuance but there was a succession. Thus, upon a transfer the transferor or predecessor would get the same relief as he would have got if the business had been discontinued. This provision is made by the new sub-s. (4). But such relief can be given once only in respect of a business. Therefore, when the owner, who transfers, has got relief under sub-s. (4), it would not be right for the transferee to get relief under sub-s. (3) if and when the business is discontinued. For this reason the words that have been cited are interpolated in sub-section (3).

This being the clear purpose and effect of the amendments, their Lordships see no reason for thinking that they impose upon the word "discontinued" in sub-s. (3) any other than its natural meaning which had indeed received unanimous judicial sanction in the Courts of India, and they would further observe that it would only be a compelling con-

text which could by virtue of an amendment require a different interpretation of words so construed. But in fact the amending provisions so far from raising any doubt as to the meaning ascribed to "discontinued" appear to enforce that meaning. Under the unamended Act, S. 25 (3) gave relief in the event of discontinuance: the amendment introduced a qualification, not enlarging or altering the meaning of discontinuance but providing that, if there was a succession in respect of which relief was given, there should not be relief upon discontinuance. To construe this provision as meaning that "discontinuance" includes succession appears to do violence to plain language.

It is however to S. 26 and its amendments that much argument was directed. Sections 25 and 26 no doubt form part of a single scheme and their interaction must not be ignored. But S. 26 is primarily directed not to the circumstances in which relief from taxation is given but to the apportionment of tax where relief is not given. Its application to the case under appeal is not in doubt. It is sub-s. (2) of S. 26 as amended by the amending Act which applies, and, inasmuch as at the time of making the assessment, i. e., in November 1939, the respondent had been succeeded in carrying on the business by the company, each of them became assessable in respect of his actual share, if any, of the income, profits and gains of the previous year. If the subsection had not been amended, the company as the successor would have been assessable as if it had been carrying on the business throughout the previous year and had received the whole of the profits of that year. The language of S. 26 both in its original and in its amended form appears to be unambiguous and there is nothing in it that can throw any doubt upon the interpretation which must be given to S. 25. It is true that in the result the respondent may have suffered a disadvantage. When he transferred his business to the company on 1st January 1939, he presumably did so upon the footing of the existing law, including the unamended S. 26, so that he could count on the company as successor being assessed to the profits of the business of the previous year. It probably did not matter to him therefore that he would get no relief under S. 25 (3). But by the time the assessment was made in November 1939, the law had been changed and as the result of the amended sub-s. (2) of S. 26 he became liable to an assessment not contemplated by him or his transferee. The relief that is given upon discontinuance might ultimately accrue to the company but that, he justly says, is not his relief. It is possible that there is here a flaw

in the legislative scheme which requires remedy. It would appear *prima facie* at least that in such a case the burden of so-called double taxation falls upon the tax-payer notwithstanding the plain intention of the section to avert it. But this is a consideration which cannot be allowed to influence the clear interpretation of the section, though it may well afford grounds for amending legislation.

In the result their Lordships agree with the reasoning and the decision of Leach C. J. and Patanjali Sastri J. in (1943) 11 I. T. R. 247¹ rather than with that of the High Court of Bombay. The appeal must be allowed and the two questions referred to the High Court by the Commissioner of Income-tax must be answered in the negative. The respondent must pay the appellant's costs of this appeal and of the reference. Their Lordships will humbly advise His Majesty accordingly.

R.K.

Appeal allowed.

Solicitors for Appellant—Solicitor, India Office.

Solicitors for Respondent —

Barrow Rogers & Nevill.

A. I. R. (32) 1945 Privy Council 140

(From Jamaica)

13th November 1944

LORDS RUSSELL OF KILLOWEN, PORTER,
SIMONDS AND GODDARD AND
SIR MADHAVAN NAIR

Daniel Youth — Appellant

v.

The King.

Privy Council Appeal No. 12 of 1944.

(a) Criminal trial — Jury trial — Conviction based on evidence—Interference by Privy Council in appeal.

When there was evidence against the accused on which the jury were entitled to convict its strength is not a matter for the Privy Council to determine in appeal: the jury are sole judges unless some step has been taken which is contrary to natural justice or some grave and substantial injustice has been done. [P 143 C 1]

Cr. P. C. —

(41) Chitaley, S. 297 N. 13 Pt. 10; S. 404 N. 2 Pt. 6.

(41) Mitra, page 1290 N. 1099.

(b) Criminal trial — Joint trial—Reception of evidence admissible against one of accused—Validity of—English practice.

No doubt in all joint trials the mind of the jury may be influenced by the reception of evidence which is only admissible against one of the accused, but the practice in England has always been in a joint trial to admit such evidence, leaving it to the presiding judge to warn the jury that the evidence must not be used to strengthen the case against or lead to the conviction of a prisoner against whom it is not admissible. [P 143 C 1]

(c) Criminal trial—In England joint or several trials is discretionary with presiding Judge — Privy Council in appeal will not override discretion.

The question of joint or several trials is always in the discretion of the presiding Judge. The discretion must of course be a judicial one. The Privy Council in appeal will not override the Judge's discretion had he been asked to try the prisoners separately and refused to do so. Much less will it interfere where such request was not made and the trial was held jointly. [P 143 C 1]

Cr. P. C. —

('41) Chitaley, L. P. Cl. 41 N. 3; S. 404 N. 2 Pt. 6.

('41) Mitra, page 1290 N. 1099.

(d) Evidence Ordinance 3 of 1901 of the Revised Laws of the Turks and Caicos Islands 1909, Ss. 99 and 102—Scope and applicability of.

Sections 99 and 102 deal only with witnesses called to give evidence in Court. Section 99 can have no bearing on a case where husband and wife are being jointly tried. In such a case, on the one hand the wife cannot be called as a witness against the husband, by reason of the wording of the section, and on the other she cannot be prevented from giving evidence on her own behalf, nor can a statement she has made be shut out, since it is evidence against her. So in the case of S. 102. A statement made outside the witness box is obviously inadmissible against anyone except the person making it, but the section cannot be intended to prevent the police or indeed any third person outside a Court of law listening to the statement of a wife suspected of a crime or the wife from excusing herself or explaining the circumstances, even though the explanation or excuse may implicate her husband. The section is dealing with evidence given in the witness box, and means that marital disclosures cannot there be given in evidence against an accused. It does not preclude a statement by the wife being used as evidence for and against her even if it implicates her husband though the statement would be inadmissible against the husband. [P 143 C 2]

G. R. Blanco White and Harris Walker —

for Appellant.

Kenelm Preedy — for the King.

Lord Porter. — Their Lordships have already indicated that they would humbly advise His Majesty that this appeal should be dismissed and that they would give their reasons for tendering such advice in due course. Those reasons are set out below. The appellant and his wife Amelia Youth were jointly charged on indictment in the Supreme Court of Turks and Caicos Islands before His Honour S. T. B. Sanguinetti and a jury of twelve with the murder of one Poland Smith in the Parish of Saint George at the Bight of Blue Hills. Both pleaded not guilty but were convicted and sentenced to death: the wife's sentence however was afterwards commuted to penal servitude for life. The husband alone appealed first to the Supreme Court of Judicature of Jamaica and subsequently by special leave to His Majesty in Council. The appellant lived in a small settlement on Caicos Island called Thomas Stubbs Settlement which appears to have consisted of only three houses: one inhabited by the appellant and his wife, the next by the deceased man, his wife and family, and the third by the dead man's mother-in-law. There was ample evidence of

bad blood between the appellant and the deceased and indeed that the appellant threatened to get him out of the Settlement and had been heard to say with reference to him "Something is going to happen serious." Some miles to the west of this Settlement lies another and larger settlement known as Bight Settlement, a road or path joins the two Settlements, and from this road a track leads to the seashore which is about half to two-thirds of a mile distant. The dead man was accustomed to pay a visit each Sunday afternoon to friends at the Bight Settlement and on Sunday, 5th July 1942, as usual he left his house about 5 o'clock and visited one James Pratt, who lived two or three miles away. He arrived about 6 P. M., left about 10 P. M., but never reached his home. On Tuesday, 7th July 1942, his dead body was found floating in the sea some distance to the west of the Bight Settlement. Death apparently was not due to drowning but to a combination of injuries which had been inflicted upon him: they consisted of three scalp wounds towards the back of the head, a jagged wound below the left ear and a cut through the right side of the lower jaw penetrating through the inferior maxilla. Though the last mentioned wound would cause profuse bleeding, the blood would not, necessarily be on the assailant. Later the same day at a spot lying just off the track mentioned above a sandy clearing was found blood-stained and trampled and marked by footprints. The clearing was about one mile from Thomas Stubbs Settlement and 21 chains from the shore.

The bloodstains continued for about 200 yards to the beach and on the beach were found two sets of footprints as if two persons walked face to face sideways to the sea. The two sets were about two feet apart heavily indented, as if a weight was being carried and between them at one spot was a collection of blood. One set was larger than the other. According to the evidence the appellant and his wife left home a long time after the dead man, walking in the direction which he had taken towards the Bight Settlement. At sunrise the following morning Amelia Youth was seen coming from the direction in which she and her husband had gone the previous evening and shortly afterwards the appellant came from the same direction towards his house. That same morning a farmer living at Bight Settlement saw two persons coming eastwards along the beach about 4 A. M. After they saw him the two turned back in the direction of Stubbs Settlement, but he was unable to identify who they were. On the same day there was found on the floor of the

Youth's house a machete without a handle which could have caused the wound on the right-hand side of the dead man's face, but no blood was in fact found on it. The two accused were seen by the police about 3 P. M. on 7th July and the appellant then had a bruise over his left cheek, scratches on his throat, and a dark stain on his shirt. The stain was not from blood and is immaterial. The explanation given by the appellant and his wife as to the other injuries was that they had had a quarrel the night before in the course of which he had struck his face against the room door and she had scratched him. After this interview the appellant, who was wearing an old blue shirt and pants, asked leave to go home to change his clothes and started on his way but was called back and thereupon ran away and hid himself. He was subsequently arrested the same day, but again escaped and was finally re-arrested on 11th July. Meanwhile his wife was arrested and kept in custody.

Later on, viz., on 22nd July, in consequence of certain information which had been received one of the local constables and a clerk went to the Youths' house and searched in a field about 40 feet beyond a wall which stood east of the house, and was itself 15 to 20 feet from the house. The appellant used this field for planting corn, potatoes, and such like purposes and in it the constable found a clump of dry bush which had apparently been gathered together and upon which a few small stones had been placed. Underneath he found two cave holes going down vertically into the rock and in them were two sticks or clubs. The larger one had upon it diffused stains of human blood. The smaller was also smeared with blood, but it was impossible to say whether this blood was or was not human blood as the quantity found was too small to enable a conclusion to be reached. Either of the two sticks might have caused the injury at the back of the head inasmuch as the wounds found on the deceased man, except that which cut through the jaw, must have been caused by a blunt instrument or by the head coming in contact with a hard surface, e.g., stone or wood. The matters set out above constitute the evidence admissible against the appellant. The information however which led to the discovery of the sticks or clubs came from the female accused and is contained in the statement set out below :

"On Saturday 4th July 1942 I and my husband Daniel Youth who is commonly called General had a little fight, and he knocked his face just above his eyes on the side of the house, all these scratches that he has on his face now were not there on Saturday. My husband did not sleep home on Sunday night

5th July 1942, he went out just about sunset, and he never came home until Monday morning. About 10 A. M. my husband on Monday morning left to go for conchs, and he returned home at or about 1 o'clock. My husband then said to me you see Poland home? I said to him I am not looking out for Poland. He replied to me you wont see that damn bitch back in Thomas Stubbs, he said I done murder his ass out last night and dragged him in the sea. I did not believe him at first so he went to eastward and he brought a lignumvitae stick a big stick full up with blood and he said this is the stick that I killed him with. I said to him General you should not have killed Poland out like that and he said to me you aint glad, that damn bitch out of Thomas Stubbs so you can live in peace and he tell me if I talk it he was going to carry me cross to northward and kill me and put me in the hole he said just how he murdered Poland he would murder me the same way. The same day when we heard that Poland Smith was murdered he sent Rosina my sister in the field to get some corn and while she was gone he tell me dont mind what James Pratt and them tell me I must tell them nothing because if I do he will still kill me how he tell me before. He carried the stick in the cave hole to eastward of the house in the field. Sunday night he had on one short old pair of ozna-burg pants and one old blue shirt and waistcoat. He told me he lay way for Poland down in the road and the first stroke he gave him was on his head to knock all his senses away from him. I am telling you how to get the stick its on the east side of my house in the banana bottom some potatoe slips and then there are some rocks and near that is the cave hole.

(Sgd.) AMELIA YOUTH."

The same advocate had been assigned to defend both prisoners. They were jointly charged and jointly tried. No application was made that their trials might be separated. When however the statement was tendered in evidence it was objected to by defending counsel, the grounds of objection being that persons whether under arrest or not should not have statements elicited from them. This objection was overruled by the presiding Judge, but the jury were warned with the greatest care both then and subsequently and in the summing up that this statement was not evidence against the husband and must not be taken into consideration in determining his guilt or innocence. Neither of the accused elected to give evidence and both were found guilty of murder. Daniel Youth alone appealed to the Supreme Court of Jamaica, his contention being that the statement was inadmissible against him and whatever warning may have been given it must have so influenced the minds of the jury as to have made his trial unfair.

His appeal was dismissed on 30th May 1943, on the ground that the statement was admissible for and against the wife and that the jury had been warned that they were on no account to take the statement as evidence against the husband. Their Lordships find themselves in agreement with the Supreme Court. There was evidence against the appel-

lant on which the jury were entitled to convict. Its strength is not a matter for their Lordships to determine: the jury are sole judges unless some step has been taken which is contrary to natural justice or some grave and substantial injustice has been done. In the present case, it is said that the admission of the statement must necessarily have so influenced the mind of the jury that the appellant has been deprived of the substance of a fair trial. Their Lordships would point out the statement was evidence which might be regarded either as favourable or unfavourable to Amelia Youth and as such it was imperative for the prosecution to put it in evidence. It is true no doubt that in all joint trials the mind of the jury may be influenced by the reception of evidence which is only admissible against one of the accused, but the practice in this country has always been in a joint trial to admit such evidence, leaving it to the presiding Judge to warn the jury that the evidence must not be used to strengthen the case against or lead to the conviction of a prisoner against whom it is not admissible. In truth the real complaint in the present case is that the prisoners were tried jointly and not separately — the submission being that they should have been tried separately and the husband's case taken first. The question of joint or several trials however has always been left to the discretion of the presiding Judge. The discretion must of course be a judicial one, but here their Lordships would point out that no application was made to sever the trials nor in their view would it have been possible to override the Judge's discretion had he been asked to try the prisoners separately and refused to do so. Much less would it have been possible to interfere where such request was not made. So far their Lordships have been dealing with the matter as if no specific provisions were in force which had a bearing upon it.

The provisions, however, of the Evidence Ordinance 3 of 1901 of the Revised Laws of the Turks and Caicos Islands, 1909, are relevant to its consideration. Two of those provisions must be quoted, and are as follows:

"99. In all criminal proceedings the accused, and the husband or wife of the accused, as the case may be, may be called as a witness, but subject to the following provisions: (i) The accused shall not be called as a witness without his consent; (ii) the wife or husband of the accused shall not be called as a witness without the consent of the accused, except in any case in which the wife or husband might have been compelled to give evidence before the commencement of this ordinance.

"102. No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is

or has been married; nor shall he be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other, and except in the cases mentioned in Ss. 99 and 100."

The appellant relied upon these sections, and, in particular on S. 102, as precluding the giving in evidence of this statement of Amelia Youth in the present proceedings. As to 99, it was said that the statement became evidence when it was put in, and could not be put in without the husband's consent, and as to 102, it was said that the statement contained a communication made by the husband and was therefore inadmissible since no consent had been given. Their Lordships do not find themselves able to accept these arguments. Both sections appear in a group of provisions entitled "Production and Effect of Evidence," and under the sub-heading "Witnesses." From these headings it would appear that the sections deal and deal only with witnesses called to give evidence in Court. But apart from this consideration S. 99, where it says "the wife... of the accused... shall not be called as a witness without his consent," points to the same result. Moreover, the section has, in their Lordships' view, no bearing on a case where husband and wife are being jointly tried. In such a case, on the one hand the wife cannot be called as a witness against the husband, by reason of the wording of the section, and on the other she cannot be prevented from giving evidence on her own behalf, nor can a statement she has made be shut out, since it is evidence against her. So in the case of S. 102. A statement made outside the witness box is obviously inadmissible against anyone except the person making it, but the section cannot be intended to prevent the police or indeed any third person outside a Court of law listening to the statement of a wife suspected of a crime or the wife from excusing herself or explaining the circumstances, even though the explanation or excuse may implicate her husband. The section is dealing with evidence given in the witness-box, and means that marital disclosures cannot there be given in evidence against an accused. The statement under consideration was neither given in evidence nor disclosed as evidence against the husband. It was admissible for and against the wife, and was rightly used as evidence in her case. The appellant has no cause of complaint under the sections. The statement was not put in against him, but was properly used in the case of his co-accused, and the jury were carefully warned against paying any regard to it in his case. In their Lordships' view, therefore, the sections

do not avail the appellant. They will humbly advise His Majesty that the appeal should be dismissed.

G. N. *Appeal dismissed.*

Solicitors for Appellant — *Druces & Attlee.*

Solicitors for the King — *Burchells.*

A. I. R. (32) 1945 Privy Council 144

(*From Court of Appeal for Eastern Africa*)

20th December 1944

LORDS THANKERTON, WRIGHT AND
GODDARD, SIR MADHAVAN NAIR
AND SIR JOHN BEAUMONT

Twentsche Overseas Trading Co. Ltd. —
Appellants

v.

Uganda Sugar Factory Ltd. —
Respondents.

Privy Council Appeal No. 26 of 1943.

(a) Contract — Collateral agreements — They must be complete — They are viewed with suspicion as they have effect of varying or adding terms of contracts and must be strictly proved.

Collateral contracts must from their very nature be rare. A collateral agreement must be in every sense a complete legal contract, and the effect must be to vary or add to the terms of the contract. Such collateral contracts are viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have effect of lessening the authority of written contracts by making it possible to vary by suggesting the existence of verbal collateral agreements relating to the same subject-matter: (1913) A. C. 30, *Rel. on.* [P 145 C 1]

(b) Contract — Frustration — When it occurs depends on particular case.

Whether frustration occurs or not, depends on the nature of the contract and on the events which have occurred. [P 145 C 2]

(c) Contract — Frustration — Applicability — Contract held not frustrated.

The doctrine of frustration may apply to a contract for unascertained goods. [P 146 C 2]

T company contracted to supply steel rails Krupp section to U company. A carefully drawn specification defined precisely what were the goods called for by the contract. That specification did not define what was to be the source of the goods. The contract was silent on the point :

Held that to introduce into the specification the term that the goods should be the manufacture of Ferrostaal would be to vary the contract by defining what the contract had left open. The contract was not frustrated, because only one of the many possible ways of performing it had become illegal and impossible. The parties to the contract did not contract on the footing or common assumption that the goods sold would come only from Germany. [P 146 C 2]

C. T. LeQuesne and R. J. Sutcliffe —

for Appellants.

Cecil Havers & Arthian Davies — for Respondents.

Lord Wright — This is an appeal from a judgment of the Court of Appeal for Eastern Africa at Mombasa, reversing a decision in favour of the appellants of the High Court of Uganda, sitting at Kampala, Uganda. The Court of Appeal held that the respondents were entitled to recover damages in an action brought by them as plaintiffs against the appellants as defendants for breach of a contract to deliver steel rails. But the Court decided an issue as to the contract price in favour of the appellants. On that part of the decision the respondents have brought a cross-appeal. The appellants are a company incorporated in Holland, having a branch at Kampala, Uganda. The respondents own and operate a sugar factory in Uganda, on and for the purposes of which they operate about 72 miles of railway. The contract was in writing and was contained in the following document :

Kampala,

12th August 1939.

N. V. Twentsche Overzee Handel Mij.

Twentsche Overseas Trading Co. Ltd.

To: Messrs. Uganda Sugar Factory Ltd.,
Lugazi.

Dear Sir,

We beg to report as follows on your order as per your Indent No. 92/Tech.

Yours faithfully,

N. V. Twentsche Overzee Handal Maatschappi J.
(Twentsche Overseas Trading Co. Ltd).

No. 92/Tech. (Sd.) W. SAMUEL.

Description of Goods: 3 (three) miles of New Un-mounted Light Railway Track for 24" Gauge, consisting of 70 mm. high 20 lbs. rails, Krupp Section K. 10C in dead lengths of 5 m. with 2900 steel sleepers per mile 130 mm. wide, weighing about 11 lbs./yds., Krupp Section K. 105B of 1000 mm. cut off length, with closed ends and with 2 holders pressed on, complete with all accessories, i.e., fish-plates, fishbolts, nuts, clips, clipbolts and nuts, etc. Approximate weight per mile of track 50,300 kg.

Price £390 per mile of track c.i.f. Mombosa, not landed.

Terms: At 90 days sight in London.

Shipments: One mile each in November 1939, December 1939, January 1940.

For and on behalf of :—

Uganda Sugar Factory Ltd.

(Sd.) R. G. VEDD.

General Manager.

Order Accepted by H.O. Technical O.C. 1244.

Please return one copy duly signed by you.

Prices without engagement unless otherwise stated in this report.

This document to which both appellants and respondents were parties, and which both Courts have held to embody the bargain between them, contains no provision as to the source from which the appellants were to obtain the goods. The reference in it to Krupps does not indicate a source of supply; it is merely an item in the specification of the

goods required by the respondents because they were using rails manufactured by Krupps, and it was necessary that the rails ordered under the contract should correspond to those made by Krupps, so that the new rails should, when supplied, fit the rails already in use. The respondents claimed however that the rails specified under the contract were to be rails manufactured by a German firm called Ferrostaal, and by that firm only. On this they based their claim to be excused from their failure to deliver the goods, because to do so, they said, would have involved a dealing with alien enemies and hence the performance of the contract became impossible and illegal. Their case was that the manufacture of the goods in Germany and their importation from Germany was the only mode of fulfilling the contract and was the only mode of fulfilment which was contemplated by the parties and was the condition upon which the appellants entered into the contract. In the first place, they based this contention on an allegation that there was a collateral oral agreement between them and the respondents that the goods should be manufactured by and procured from the Ferrostaal Company in Germany. They failed on that warranty contention as both the trial Judge and the Court of Appeal held. It depended on proving an oral agreement said to have been made about three weeks before 12th August 1939. As they failed on that issue of fact, it need not now be further considered. Whatever was said between the parties at the earlier date was superseded by the final agreement which the Courts of Appeal held was contained in the document of 12th August 1939. The Court of Appeal particularly relied upon the considerations laid down in the House of Lords in (1913) A.C. 30,¹ especially in the opinion delivered by Lord Moulton at p. 47 that collateral contracts must from their very nature be rare. A collateral agreement must be in every sense a complete legal contract, and the effect must be to vary or add to the terms of the contract:

"Such collateral contracts are viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have effect of lessening the authority of written contracts by making it possible to vary by suggesting the existence of verbal collateral agreements relating to the same subject-matter."

Their Lordships have quoted these words because they go to help the decision of the main contention as to frustration relied on by

the appellants. If, they say, the contract does not expressly require that the rails should be supplied by the Ferrostaal Company and if there is no collateral warranty to that effect, they are still entitled to be relieved from the obligation to supply, because to the knowledge and intention of both parties, irrespective of contractual stipulation, the goods were to come from Germany and as this had become illegal and impossible the contract was frustrated. It was not true, they said, that there was not frustration unless there was a contractual obligation that the goods were to come from Germany. The word frustration is here used in what may now that it has received statutory recognition in the Law Reform (Frustrated Contracts) Act, 1943, be regarded as a technical legal sense. It is a sort of shorthand: it means that a contract has ceased to bind the parties because the common basis on which by mutual understanding it was based has failed. It would be more accurate to say, not that the contract has been frustrated, but that there has been a failure of what in the contemplation of both parties would be the essential condition or purpose of the performance. Here it is said that both parties contemplated that the rails were to come from Germany and, when the possibility of that being done died, the contract died with it. It is not now necessary to examine the various decisions which have sought to define and explain the nature of frustration. It is enough to refer to the recent decisions of the House of Lords in (1943) A. C. 32² and (1942) A. C. 154³ in which the relevant principles are defined and explained. In the former the goods were under the contract which was made before the outbreak of war between an English and a Polish company sold for delivery c. i. f. Gdynia, which at the date of the contract was Polish but when the time came for delivery had become by occupation an enemy territory. There was no difficulty there in holding that the contract was frustrated by intendment of law having regard to its express terms. It could not be performed except by trading and intercourse with the enemy. Whether frustration occurs or not, depends on the nature of the contract and on the events which have occurred. Here there was nothing in the contract itself which called for the appellants obtaining the rails from Germany. So far as concerns the respondents the buyers, their

2. (1943) 1943 A. C. 32 : 111 L. J. K. B. 433 : 167 L. T. 101 : (1942) 2 All E. R. 122, *Fibrosa Spolka Akcyjna v. Fairbairn Lowson Combe Barbour Ltd.*
3. (1942) 1942 A. C. 154 : 110 L. J. K. B. 433 : 165 L. T. 27 : (1941) 2 All E. R. 165, *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation.*

1. (1913) 1913 A. C. 30 : 82 L. J. K. B. 245 : 107 L. T. 769, *Heilbut Symons & Co. v. Buckleton.*

evidence was that it was purely a matter for the appellants where the rails came from. There were many possible sources of supply, from manufacturers in England, or America, or Belgium, or France, or Germany. The contract left the respondents with a free hand in the matter of how they performed their contract. The trial Judge found that

"the balance of probability is that to the knowledge of both sides these goods were to be supplied by Ferrostaal of Germany,"

or as he puts it later in his judgment

"it was in the contemplation of both parties that these rails should be supplied by Ferrostaal of Germany."

In the Court of Appeal a more qualified view was taken which is in their Lordships' opinion the most that can be said in support of the appellants' contention. Webb C. J. put his opinion clearly. "I think" he said,

"all that the evidence established is that the defendants contemplated getting the rails from Ferrostaal and the plaintiffs knew this and were content, but it did not establish that the defendants were bound to supply Ferrostaal rails and none other—clearly all that the plaintiffs insisted upon was rails that would be interchangeable with their Krupp rails."

Thacker J., coming to much the same conclusion, thought that

"the respondents cancelled the contract after the war because they believed that they were protected by the condition which they would have had if they had proved, as they did not, the collateral agreement."

In their Lordships' judgment, the appellants were not entitled to invoke the doctrine of frustration on the ground either of the nature of the contract or of the facts. The war did not terminate the contract having regard to its actual terms. Shipment from Germany was not merely no part of the express contract, but it could not be described as the basis or foundation of the contract within the meaning of the frustration doctrine. It was simply the convenient method of performing the contract which the sellers contemplated. Mr. Le Quesne submitted that the appellants lost the opportunity which they possessed before the war of shipping from Germany. That may be true but it was their own affair. Their Lordships may here again refer to Lord Moulton's words quoted above. To accede to the appellants' arguments would be to impair the confidence of commercial men in the conditions of their contracts. It would lessen the authority of written contracts not merely as Lord Moulton was contemplating by the too easy introduction of collateral agreements but by lax or too wide application of the doctrine of frustration. Modern English law has recognised how beneficial that doctrine is when the whole circumstances justify it, but to apply it calls for circumspection. In the present case, a care-

fully drawn specification has defined precisely what are the goods called for by the contract. That specification contains no term intended to define what is to be the source of the goods. The contract is silent on the point. To introduce into the specification the term that the goods should be the manufacture of Ferrostaal would be to vary the contract by defining what the contract has left open. And in considering the question of frustration the same result would follow. In a case like this the contract is not frustrated, because only one of the many possible ways of performing it has become illegal and impossible.

Their Lordships do not know of any strictly parallel case in which a contract has been held to be frustrated. The appellants did indeed rely upon words of Russell J. (as he then was) in (1921) 2 Ch. 331⁴ at p. 377. He said of the contract he was then dealing with "There is no doubt in my mind that this contract was to the knowledge of both parties a contract for the supply of goods to be obtained from Germany."

It would be proper to add the words "and to be obtained only from Germany," because it is in this way that he states the position at page 373,

"Another ground suggested was that the parties to the contract contracted on the footing that the goods sold would only come from Germany and that accordingly the continued existence or further performance of the contract would involve intercourse with the enemy or tend to assist the enemy."

These words of the learned Judge, while no doubt applicable to the facts and documents of this case, cannot be extended to cover a case like the present, where, as their Lordships have held, the parties to the contract did not contract on the footing or common assumption that the goods sold would come only from Germany. It is scarcely necessary to observe that according to the views of law now accepted the doctrine of frustration may apply to a contract for unascertained goods. The present appellants, who were respondents in the Court of Appeal, succeeded in their cross appeal that the words in the document of 12th August 1939, superseded the specific price named in the earlier part of the document and substituted a reasonable price. This decision involved a considerable advantage to the present appellants, and afforded justification for the order of the Court that the present respondents as they had failed on the issue of the price should not have the costs of the appeal, though they were given the costs of the trial in the first Court. Before their Lordships, the present respondents lodged a cross appeal, which in their Lordships' opinion, was bound to fail, was not persisted in.

4. (1921) 2 Ch. 331 : 91 L. J. Ch. 133 : 126 L. T. 466, *In re Badische Co. Ltd.*

Their Lordships will accordingly dismiss both the appeal and the cross-appeal. They would normally do so with costs in either case, but to avoid separate taxations they will order that the costs of the respondents in the appeal should be reduced by a set-off of one-eighth part thereof, on account of the costs of the cross-appeal. They will humbly so advise His Majesty.

R.K. *Order accordingly.*
Solicitors for Appellants — *Hugh V. Harraway & Son.*
Solicitors for Respondents — *Lattey & Dawe.*

A. I. R. (32) 1945 Privy Council 147

(From Bombay : ('42) 29 A.I.R. 1942

Bom. 154 (1))

3rd July 1945

LORD THANKERTON, LORD PORTER
AND SIR MADHAVAN NAIR

Ali Mahomed Adamalli — Appellant

v.

Emperor.

Privy Council Appeal No. 4 of 1944.

(a) Contempt of Court — Committal or not is discretionary—Privy Council does not interfere with discretion unless principles of natural justice are disregarded.

The question of committal or non-committal for contempt is one for the exercise of the discretion of the Court before whom the application to commit is brought and unless there is found to be a serious disregard of the principles of natural justice, the Board would be slow to interfere with that discretion : (1877) 46 L. J. Ch. 375, *Ref.* [P 150 C 1]

(b) Contempt of Court—Discretion—Another remedy open — Fact should be considered while exercising discretion.

No doubt the fact that there is another remedy available is a matter for the Court to consider when exercising its discretion whether to commit or not to commit, but on the other hand, the desirability of speed and the necessity of ensuring that the orders of the Court should be obeyed are also matters of importance. The Court may, therefore, consider that after two years of disobedience a heavier fine than that permitted by the Wakf Act should be imposed, or in a proper case that imprisonment should be awarded: (1765) Wilm. 243, *Ref.* [P 150 C 2]

(c) Contempt of Courts Act (1926), S. 2 (3)—Failure to furnish information under Wakf Act—High Court can proceed for contempt.

Though the failure to furnish information is an offence under the provisions of the Wakf Act yet it is not an offence punishable under the Penal Code. Consequently the High Court is not prohibited from dealing with it by the terms of S. 2 (3), Contempt of Courts Acts : ('33) 20 A.I.R. 1933 Pat. 142 and ('33) 20 A.I.R. 1933 Pat. 204, *Ref.* [P 151 C 2]

C. S. Rewcastle and S. P. Khambatta —

for Appellant.

J. Millard Tucker and R. K. Handoo —

for the Crown.

Lord Porter.—This is an appeal by special leave from a judgment of the High Court of Bombay dated 2nd December 1941, by which the appellant was fined Rs. 1000 for contempt under the Contempt of Courts Act

(12 of 1926) in failing to obey an order made by the Acting Chief Judge of the Court of Small Causes at Bombay on 4th September 1939. The order had directed the appellant to furnish a statement of particulars of wakf property under S. 3, Mussulman Wakf Act, 1923 (Act 42 of 1923) as amended by the Mussalman Wakf (Bombay Amendment) Act, 1935 (Bombay Act 18 of 1935).

Under that section it is provided that every mutawalli shall furnish to the Court within the local limits of whose jurisdiction the property of which he is mutawalli is situated a statement containing certain particulars.

By S. 5 every mutawalli is ordered to prepare and furnish to the Court to which such statement was furnished a full and true statement of accounts containing certain prescribed particulars, within three months after the 31st March next following the date on which the statement referred to in S. 3 had been furnished.

Section 6A (1) enacts :

"Notwithstanding anything contained in S. 3 it shall be competent to the Court on failure of a mutawalli to furnish a statement as required under the said section to require the mutawalli to furnish within such time as the Court shall fix a statement containing all or any of the particulars referred to in the said section."

Section 6B contains similar provisions on failure of a mutawalli to furnish a statement of accounts under S. 5.

Under the provisions of S. 6C of the Act—

"(1) The Court may, either of its own motion or upon the application of any person claiming to have an interest in a wakf, hold an inquiry in the prescribed manner at any time to ascertain—

(i) Whether a wakf is a wakf to which this Act applies;

(ii) Whether any property is the property of such wakf and whether the whole or any substantial portion of the subject-matter of such wakf is situate within the local limits of the jurisdiction of the Court; and

(iii) Who is the mutawalli of such wakf.

(4) On completion of the inquiry provided for in sub-s. (1) . . . , the Court shall record its finding as to the matters mentioned in the said sub-section. . . ."

By S. 6F it is provided that :

"The entries made by the Court in the register of wakfs and the findings recorded under S. 6C shall, subject to the provisions of S. 6C, be final for the purposes of this Act."

By S. 6L of the Act :

"(1) There shall be constituted in each district a Wakf Committee to advise and assist the Court in all matters relating to the registration, superintendence, administration and control of wakfs."

And by S. 6M :

"(1) It shall be competent to the Court to refer at any time to the Wakf Committee or any three or more members thereof, for advice, opinion, enquiry, report or recommendation, . . . any matter relating to the registration, superintendence, administration and control of wakfs and in particular any matter relating to

(a) the conduct of a mutawalli or a trustee in the administration of a wakf or his fitness to continue as a mutawalli or a trustee ;

(b) the settlement, cancellation or alteration of a scheme for the administration of a wakf ; or

(c) the application of the funds of a wakf or any surplus thereof."

By section 10 :

"Any person who is required by or under S. 3 ... or S. 6A ... to furnish a statement of particulars ... or who is required by S. 5 or S. 6B to furnish a statement of accounts ... shall if he, without reasonable cause, the burden of proving which shall be upon him, fails to furnish such statement ... be punishable with a fine which may extend to five hundred rupees. ..."

The appellant is a member of the Dawoodi Bohra Community and is alleged to be mutawalli of certain property, said to be wakf property. This property is in fact situate within the jurisdiction of the Court of Small Causes at Bombay.

On 27th September 1938, the appellant was served with a notice, dated 19th January 1938, issuing out of the Court of Small Causes at Bombay, requiring him to appear before the Chief Judge of the said Court to show cause, if any, why he had failed to furnish statements of particulars and accounts under ss. 3 and 5 of the Act, respectively, in respect of this property. The appellant resisted the notice on the grounds that the property in question was not wakf property and that he was not its mutawalli. He said that the property had been donated as a gift by his forefathers to His Holiness the Mullaji Sahab in whom it was now vested. The Chief Judge referred the matter to a Sub-Committee of the Wakf Committee for investigation and report and the Sub-Committee reported that : (A) there was no evidence that the Mullaji Sahab was connected with the property ; (B) there was conclusive evidence that the property was managed by the appellant on behalf of his firm for the benefit of the Dawoodi Bohra Jamat without any interference or intervention by the Mullaji Sahab ; (C) there was no recorded instance of accounts having been rendered, and balances paid over, to the Mullaji Sahab ; (D) the rents received from the property had been credited, and expenses incurred debited, to a special account opened in the books of the appellant's firm ; and (E) there was evidence that the property had been used for charitable purposes for twenty or forty years. The conclusion of the Sub-Committee was that the property in question was a wakf property.

On the case coming up again in the Court of Small Causes, before another Judge of that Court, the Judge, by his judgment dated 4th September 1939, found himself in entire agreement with the conclusion of the Sub-Committee and ordered the appellant to furnish

within thirty days from the date of the judgment a statement of particulars under S. 3 of the Act (in the form in Sch. D of the Wakf Rules) and a statement of accounts under S. 5 of the Act (in the forms in Schs. A and B of these Rules) in respect of the property, in default of which the sanction required by S. 10B (1) would be given for his prosecution for an offence under S. 10 of the Act. The appellant refused to obey this order, and, therefore, in accordance with its terms, sanction for his prosecution was granted on 9th October 1939. At his prosecution in the Court of the Presidency Magistrate, 4th Court, at Girgaum, Bombay, the appellant pleaded "not guilty," and, in a written statement, denied that the Act applied to the property in question, or that he was its "mutawalli" within the meaning of that word as defined in the Act.

By his judgment, dated 9th August 1941, the Magistrate found the appellant guilty and convicted him under S. 10 read with S. 6A of the Act for failing to furnish a statement of particulars of the property in question and sentenced him to pay a fine of Rs. 201, or, in default to suffer two months' simple imprisonment. The Magistrate was of opinion that as the findings of the Judge of the Court of Small Causes had been recorded under S. 6C (4) of the Act, the appellant was precluded by S. 6F thereof, from questioning their validity. Against his conviction and sentence, the appellant appealed to the High Court of Judicature at Bombay. His appeal was heard by a Bench consisting of Beaumont C. J. and Wadia J., who set aside the conviction, ordered refund of the fine imposed (if paid) and remanded the case to the Magistrate for re-trial.

Beaumont C. J. (with whose judgment Wadia J. agreed) was of opinion that the Chief Judge of the Court of Small Causes had no jurisdiction, under S. 6M of the Act, to refer the question whether the property was or was not wakf property to the Wakf Committee, that being a matter which could be enquired into only by the Court itself under S. 6C ; and that it was open to the appellant to say that he did not know that an enquiry under S. 6C was being held, or that the Judge of the Court of Small Causes would record findings in respect of matters which would be covered by an enquiry under that section. He concluded this part of his judgment by saying :

"On that ground we must send the matter back to the learned Magistrate to be dealt with on the basis that there has not been any recorded finding under Section 6C."

The learned Chief Justice, however, added at the end of his judgment :

"There is one other matter which I desire to mention. Experience seems to show that the Dawoodi Bohra Community are very reluctant to ac-

cept this Act, and mutawallis of wakfs created by that community are reluctant to render accounts. We are not, of course, concerned with the merits of any question of that sort. All that the Court has to do is to see that the law is enforced. Now, here we have a specific order made apparently under S. 6A directing certain particulars and accounts to be delivered by the accused within a certain fixed period. That order has been disobeyed. On the face of it that seems to show that the accused has been guilty of contempt of the Court of Small Causes, and that is a matter which this Court may deal with under the Contempt of Courts Act, 1926. The matter has, of course, not been considered up to the present moment, but we propose to serve notice upon the accused and upon the Public Prosecutor to show cause why the accused should not be committed to prison, or otherwise dealt with, under the Contempt of Courts Act, for his contempt in having disobeyed the order made by the Acting Chief Judge of the Small Cause Court on 4th September 1939, directing him to furnish within 30 days from the date of the order a statement of particulars under S. 3 (in the form in Sch. D) and a statement of accounts under S. 5 (in the form of Schs. A and B), Mussalman Wakf Act, in respect of the wakf property at Falkland Road, C. S. No. 170 of Tardeo Division."

By S. 2 (1), Contempt of Courts Act, 1926 (12 of 1926), a High Court of Judicature in India established by Letters Patent (the High Court at Bombay was so established) has and exercises the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of a contempt of Court subordinate to it, as it has and exercises in respect of contempts of itself, except that S. 2 (3) provides that no High Court shall take cognizance of a contempt of a Subordinate Court, where such contempt is an offence punishable under the Penal Code.

By S. 3 of the said Act, save as otherwise provided by any law, a contempt of Court may be punished with simple imprisonment for a term which may extend to six months or with a fine which may extend to Rs. 2000 or both. In accordance with the directions of the High Court, a notice was issued out of that Court and served upon the appellant requiring him to appear and show cause why he should not be committed to prison or otherwise dealt with under the Contempt of Courts Act, 1926, for his contempt of the Court of Small Causes at Bombay caused by his disobedience to the order of that Court, dated 4th September 1939. The contempt proceedings which followed came up before Beaumont C. J. and Wadia J., who by judgment dated 2nd December 1941, found the appellant guilty of contempt of the Court of Small Causes and imposed a fine of Rs. 1000 upon him, to be paid into Court within one week, in default of payment of which the notice to show cause was to be restored to the list. In the course of his judgment the Chief Justice said:

"The respondent [the present appellant] has refused, and still refuses, to obey the order. His contention is that the order was wrong because the

property in respect of which it was made is not wakf property. But if that was his contention, he could have filed a suit in the High Court for a declaration to that effect and applied for a stay of the order of the Small Cause Court. He did not do that, and the order has been in force, and has been disobeyed for over two years. He also says that he understood from the direction to prosecute in default of compliance with the order, that that was the only penalty which he would incur. We have, however, offered him further time in which to comply with the order, but he says, through his counsel, quite definitely, that he does not intend to comply with the order.

As this is the first case of the kind which has come before the Court, we do not propose to send the respondent to prison, without the option of paying a fine. But we wish to make it perfectly clear that orders of the Court are to be obeyed, and in future when the Chief Judge of the Small Cause Court makes a specific order under S. 6A, Wakf (Amendment) Act, directing accounts to be furnished within a limited time, and that order is disobeyed, this Court will not hesitate to enforce obedience to the order by sending the disobeying party to prison, where he may remain for a period not exceeding six months under the Contempt of Courts Act."

As a consequence of this judgment, on 10th March 1942, the Public Prosecutor for Bombay applied to the Presidency Magistrate, Fourth Court, Bombay, for leave to withdraw the charge against the appellant under S. 10 read with S. 6A of the Act, which had been remitted by the High Court to the Presidency Magistrate, by its order of 12th November 1941. This leave was granted and the appellant was accordingly acquitted of the charges under S. 494 (b), Criminal P. C. Against the judgment and order of the High Court, dated 2nd December 1941, the appellant applied to His Majesty in Council for special leave to appeal which, by an Order-in-Council, dated 6th August 1942, was granted to him. The present appeal to His Majesty in Council is accordingly against the above-mentioned judgment and order of the High Court dated 2nd December 1941.

As to this matter, their Lordships would observe in the first place that there is still in existence and in force the order of the Court of Small Causes dated 4th September 1939, which has never been appealed or set aside and which the appellant has refused and neglected to obey. *Prima facie* he is, as the High Court has pointed out, in contempt. Three objections, however, are taken to the order of the High Court:

(1) It is said that the remedy of committal for contempt of Court is arbitrary and unlimited and should be most jealously and carefully watched and should only be exercised with the greatest reluctance and the greatest anxiety on the part of Judges to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject.

This contention is in substance a repetition of the language of Sir George Jessel M. R. in (1877) 46 L. J. Ch. 375¹ at pp. 381 and 382. Their Lordships have no desire to lessen the standard of care and circumspection to be observed by all Courts before exercising their jurisdiction to commit for contempt, but it must be remembered that the question of committal or non-committal is one for the exercise of the discretion of the Court before whom the application to commit is brought and unless there is found to be a serious disregard of the principles of natural justice, their Lordships would be slow to interfere with that discretion. But indeed it has not been contended that there has been such disregard; rather it is said that the appellant could have been prosecuted and convicted under the Wakf Act if proper steps had been taken to establish before the learned Magistrate that the appellant was mutawalli of wakf property, and that, in those circumstances, the arbitrary remedy of committal should not have been adopted. On this matter their Lordships agree with the observations of the learned Chief Justice already quoted as to the necessity of obedience to the orders of the Small Cause Court and do not accept the contention that the discretion of the High Court was wrongly exercised.

(2) The appellant, however, argued in the second place that the Court had no discretion in the matter. If, it was said, there is, in the case of an offence created by statute, procedure for punishment prescribed, that procedure should alone be followed and committal for contempt should not be resorted to for inflicting collateral or additional punishment. The argument was put both as a matter of right and of discretion.

As to discretion their Lordships have nothing to add to what they have already said. The contention however that a Court cannot commit for contempt if any other remedy exists is novel and no authority to that effect was quoted, or is known to their Lordships. The argument presented in the past to the Court, when a question of this kind has arisen, has been, not that the existence of another remedy precludes the application of the remedy of attachment but that if there be two remedies, one by indictment and the other by committal for contempt, the former ought to prevail inasmuch as it is more desirable that these matters should be determined by a jury than by the Court summarily. Such an argument was presented in (1765) Wilm. 243,² but did not prevail. No doubt the fact that there is another

remedy available is a matter for the Court to consider when exercising its discretion whether to commit or not to commit, but on the other hand the desirability of speed and the necessity of ensuring that the orders of the Court should be obeyed are also matters of importance. The Court may, therefore, consider that after two years of disobedience a heavier fine than that permitted by the Wakf Act should be imposed, or in a proper case that imprisonment should be awarded. An argument was at one time presented to their Lordships based upon S. 26, General Clauses Act, which runs as follows:

"When an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

Having regard to their Lordships' view, it is not necessary for them to decide whether the section applies or not. If it did their Lordships would point out that inasmuch as the prosecution has now been withdrawn the appellant will suffer only one punishment, viz., a fine for his contempt and will not be punished twice. Finally it was said that by reason of the provisions of the Contempt of Courts Act, 1926 (Act 12 of 1926), the High Court had no jurisdiction to punish contempts of the orders of the Court of Small Causes. Section 2 (1) of that Act provides that:

"Subject to the provisions of sub-s. (3), the High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice in respect of contempts of Courts subordinate to them as they have and exercise in respect of contempts of themselves."

This sub-section would if it stood alone give the High Court the authority required, but it is qualified by the terms of sub-s. (3) which is said to take away the jurisdiction of the High Court in the present case. Sub-section (3) reads as follows:

"No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code."

The appellant relied upon this sub-section and contended that the contempt of which he was found guilty was an offence punishable under the Penal Code. He maintained therefore that the High Court had no cognizance of it. To this contention two answers were made: (1) It was said that upon its true construction the sub-section only prohibited the High Court from dealing with offences punishable under the Code as contempt and that there is no provision in the Code making this particular offence punishable as contempt. The view that sub-s. (3) has reference only to cases where the Penal Code empowers the Court to punish for contempt as contempt

1. (1877) 46 L.J.Ch. 375 : 36 L. T. 332, *Costa Rica v. Erlanger*; *In re Clements*.

2. (1765) Wilm. 243 : 97 E. R. 94, *R. v. Almon*.

appears to have commended itself to some of the Courts of India : see 12 Pat. 1³ and 12 Pat. 172.⁴ Having regard to their Lordships' view that the contention that the contempt of which he was found guilty was an offence punishable under the Penal Code is unsound for the reasons hereafter given, their Lordships do not find it necessary to determine this matter. (2) Secondly, however, it was maintained that the appellant had not committed an offence punishable under the Penal Code. That he had committed an offence against the Mussalman Wakf Act was admitted, but it was said that that is not enough: to take away the High Courts' powers some offence against the provision of the Penal Code must be relied upon and none had been established. The argument was put in this way: The only section of the Penal Code which could be prayed in aid as creating a crime of which this appellant might be guilty is S. 176 which so far as is material runs as follows:

"Whoever being legally bound to furnish information on any subject to any public servant as such intentionally omits to furnish such information in the manner and at the time required by law shall be punished with imprisonment or fine."

Italics are used to stress the words to which in their Lordships' view attention must in particular be directed. It is common ground (1) that there is in existence a valid order of the Court of Small Causes ordering the appellant to furnish information; (2) that the order directs that the information be given to the Court; (3) that a Judge of the Court is authorized to receive it and is a public servant to whom the information is to be given as such; and (4) that the appellant has intentionally omitted to furnish it. But the question still remains was he legally bound to furnish it within the meaning which those words bear in the Code. The expression has been defined in S. 43 of the Act in these words:

"The word 'illegal' is applicable to everything which is an offence or which is prohibited by law or which furnishes ground for a civil action, and a person is said to be 'legally bound to do' whatever it is illegal in him to omit."

According to this definition the appellant is only legally bound to do what it is illegal for him to omit and it is only illegal for him to omit what is an offence or prohibited by law or is ground for a civil action.

The furnishing of the information, required is not prohibited by law—it is enjoined by law—nor does its omission furnish ground for a civil action. Is it then an "offence"?

It is no doubt an "offence" if that word be used in its ordinary meaning, but "offence,"

like "legally bound to do" has a technical meaning in the Code. It is defined in S. 40 which says: "Offence denotes a thing made punishable by this Code." It follows that an act or omission is not an "offence" as that word is used in the Code if it is punishable only under some other enactment.

If then Ss. 40, 43 and 176 be read together, the result follows that one who fails to furnish information which he is legally bound to furnish is punishable under S. 176, that he is legally bound to furnish what it is illegal for him to omit, that it is illegal for him to omit what is an offence and that an offence is what is punishable under the Code.

The only conclusion therefore to be derived from this language appears to be that what is punishable under the Code is punishable under S. 176 of the Code. The statement is no doubt true but it is not of much assistance in ascertaining what is punishable under the Code. To answer that enquiry one must look elsewhere than to S. 176 and if no other section of the Code deals with the matter, then one must conclude that the particular crime may be punishable under some other enactment but it is not punishable under the Code.

It follows in the present instance that though the failure to furnish information is an offence under the provisions of the Wakf Act yet it is not an offence punishable under the Penal Code. Consequently the High Court is not prohibited from dealing with it by the terms of S. 2 (3), Contempt of Courts Act.

This conclusion disposes of the last argument presented to their Lordships against the jurisdiction of the High Court to commit for contempt in this case, and as in their Lordships' opinion the other contentions put forward on the appellant's behalf fail also, their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

R.K.

Appeal dismissed.

Solicitors for Appellant — *T. L. Wilson & Co.*

Solicitors for the Crown—*Solicitor, India Office.*

A. I. R. (32) 1945 Privy Council 151
(From Lahore)

10th July 1945

LORD THANKERTON, LORD GODDARD
AND SIR JOHN BEAUMONT.

Nur Mohammad — Appellant

v.

Emperor.

Privy Council Appeal No. 21 of 1945.

Criminal trial — Acquittal — Appeal against — High Court has full power to review all evidence and to reverse acquittal — Privy Council will assume that proper practice has been fol-

3. ('33) 20 A. I. R. 1933 Pat. 142 : 12 Pat. 1 : 144 I.C. 351, Kaulashia v. Emperor.

4. ('33) 20 A.I.R. 1933 Pat. 204 : 12 Pat. 172 : 147 I.C. 1251, Jnanendra Prasad v. Gopal Prasad Sen.

lowed by High Court unless contrary can be proved.

The High Court has full power to review at large all the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. Where the High Court judgment shows that they have been at pains to deal in detail with the reasons given by the Sessions Judge for disbelieving the group of witnesses, and they have dealt in detail with them, showing on the face of their judgment that there is no necessity to presume in this case that they have not done their duty, there is no ground for invoking the assistance of the Board on account of any miscarriage of justice or the like matter. The Board will always assume that a Court has followed the proper practice unless something appears which proves the contrary. [P 152 C 1, 2]

S. P. Khambatta — for Appellant.

G. D. Roberts and C. Bagram — for the Crown.

Lord Thankerton. — In the present appeal only one question has been raised and that, as stated in the order granting leave, is a contention that the trial Court "having held there was no evidence at all on which any conviction could be based a Court of Criminal Appeal is not justified in reversing the Court of first instance by placing reliance on the very evidence which had been entirely rejected by the Court of first instance."

Their Lordships were referred, rightly enough, to the decision of this Board in the case in 61 I. A. 398,¹ and in particular to the passage at p. 404 in the judgment delivered by Lord Russell. Their Lordships do not think it necessary to read it all again, but would like to observe that there really is only one principle, in the strict use of the word, laid down there; that is, that the High Court has full power to review at large all the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. Then follows an expression, under four headings, of what would be the proper practice, and their Lordships think is the proper practice, for the High Court to follow in considering whether they should reverse the decision of the Sessions Judge. At the foot of the page there is a paragraph expressing a view which is quite common in such cases, that the Board will always assume that a Court has followed the proper practice unless something appears which proves the contrary.

In the present case the High Court judgment shows that they have been at pains to deal in detail with the reasons given by the Sessions Judge for disbelieving the group of witnesses, the Patwari and the other three alleged eye-witnesses. They have dealt in detail with them, showing on the face of their judgment that there is no necessity to presume in this case that they have not done

their duty, because on the face of the judgment they have been at pains to do so. In that view their Lordships are of opinion that there is no ground for invoking the assistance of this Board on account of any miscarriage of justice or the like matter, and that this appeal should be dismissed. Their Lordships will humbly advise His Majesty accordingly.

R.K.

Appeal dismissed.

Solicitors for Appellant — *Hy. S. L. Polak & Co.*
Solicitors for the Crown — *Solicitor, India Office.*

**** A. I. R. (32) 1945 Privy Council 152**

(From Oudh : ('42) 29 A. I. R. 1942
Oudh 358)

18th July 1945

LORD PORTER, SIR MADHAVAN NAIR
AND SIR JOHN BEAUMONT

Madan Theatres, Ltd. — Appellants

v.

*Dinshaw & Co., Bankers Ltd., through
Official Liquidator* — Respondents.

Privy Council Appeal No. 6 of 1944.

* (a) Civil P. C. (1908), O. 21, R. 2 and O. 34, Rr. 5, 4 — Question whether final decree should not be passed — O. 21, R. 2 does not apply.

Order 21, Rule 2 only applies in execution, and since execution does not begin until after a final order for sale has been passed the rule has no application when the question is whether or no a final decree for sale should be passed. [P 154 C 2]

** (b) Civil P. C. (1908), O. 34, Rr. 5, 4 and O. 23, R. 3 — Previous decree — Adjustment or payment—Debtor can plead and prove — Judge must satisfy and after enquiry pass final orders accordingly : 18 Luck. 71=1942 O.W.N. 276=('42) 29 A.I.R. 1942 Oudh 358=200 I.C. 465, *REVERSED*; ('27) 14 A. I. R. 1927 Oudh 275 = 102 I. C. 428; 11 Luck. 116 = ('35) 22 A. I. R. 1935 Oudh 313 = 155 I. C. 231; 11 Luck. 500 = ('36) 23 A. I. R. 1936 Oudh 152=158 I. C. 419; ('32) 19 A.I.R. 1932 Lah. 231=136 I. C. 732; ('35) 22 A.I.R. 1935 Lah. 168 = 158 I. C. 83; I. L. R. (1939) Lah. 313 = ('39) 26 A. I. R. 1939 Lah. 79 = 185 I. C. 75 and 42 Mad. 61 = ('19) 6 A. I. R. 1919 Mad. 792 = 48 I. C. 196, *OVERRULED*.

The mortgage suit continues until the final decree is passed and there is no time limit for recording the agreement arrived at as there is under O. 21, R. 2. A decree-holder need not of course agree to any adjustment or accept payment otherwise than into Court but it is open to the debtor to allege and prove that an adjustment has taken place or payment in whole or in part has been made and received. Therefore, the Judge should satisfy himself as to whether any adjustment has been arrived at or payment made, and should follow this enquiry by an appropriate decree under which a finding of full satisfaction would lead to the dismissal of the suit and partial satisfaction to a diminution of the indebtedness whereas a finding that there had been no adjustment or satisfaction would be followed by a final decree for sale: 18 Luck. 71=1942 O. W. N. 276=('42) 29 A.I.R. 1942 Oudh 358=200 I.C. 465, *REVERSED*; ('27) 14 A. I. R. 1927 Oudh 275 = 102 I. C. 428; 11 Luck. 116 = ('35) 22 A. I. R. 1935 Oudh 313 = 155 I. C. 231; 11 Luck. 500 = ('36) 23 A. I. R. 1936 Oudh 152=158 I.C. 419; ('32) 19 A.I.R. 1932 Lah. 231=136 I. C. 732; ('35) 22 A.I.R. 1935 Lah.

1. ('34) 21 A.I.R. 1934 P.C.227; 61 I.A. 398; 56 All. 645; 151 I.C. 322(P.C.), *Sheo Swarup v. Emperor*.

168 = 158 I. C. 83 ; I. L. R. (1939) Lah. 313 = ('39) 26 A. I. R. 1939 Lah. 79 = 185 I. C. 75 and 42 Mad. 61 = ('19) 6 A. I. R. 1919 Mad. 792 = 48 I. C. 196, *OVERRULED*. [P 156 C 1]

Sir Herbert Cunliffe and S. P. Khambatta —
for Appellants.

Respondents Ex parte.

Lord Porter. — This is an appeal from a judgment and decree of the Chief Court of Oudh at Lucknow dated 17th March 1942, which affirmed a judgment and decree of the Court of the Civil Judge at Lucknow dated 23rd May 1940. The facts may be shortly stated. On 2nd July 1931, the appellants executed a simple mortgage deed for Rs. 1,50,000 in favour of the respondent bank. Some portion of this sum was paid off but on 25th August 1934, the bank instituted a mortgage suit against the appellants in the Court of the Subordinate Judge of Lucknow to recover Rs. 78,542-1-3 by sale of the mortgaged property. The bank also filed an application with the plaint praying for an attachment before judgment and the appointment of a receiver in respect of a portion of the hypothecated property and on 11th September 1934, the Court of the Civil Judge passed an order granting this application and appointing a receiver. On 18th September, an agreement was entered into between the parties whereby the exploitation rights in four films were to be sold at Rs. 12,500 each and the amounts to be credited to the appellants in part payment of the mortgage debt.

By cl. 3 of that agreement, the respondents were to credit to the mortgage account of the appellants the sum of Rs. 12,500 for each film as soon as two prints of any of the four films should be delivered to the respondents and the respondents were to enter satisfaction in the decree in the Court to that extent immediately on getting delivery. Subsequently at a date not stated in the record the appellants sold to the respondents the exploitation rights in another film for Rs. 17,500 for which Rs. 10,000 was paid in cash and Rs. 7500 was to be credited to the mortgage debt, and later still it was agreed that the transfer of the rights in three out of the four original films should be cancelled and that the rights in a sixth film should be transferred in their place but at a price of Rs. 75,000. These sums were to be in satisfaction of the mortgage debt and if there should be any excess in the hands of the respondents it was to be handed over to the appellants in cash.

On 30th November 1934, whilst these arrangements were being made, a preliminary decree was passed in favour of the respondents against the appellants for a total sum of Rs. 83,359-6-11 with future interest at 6 per cent. per annum from 31st May 1935. The exact date when the

agreements varying that of 18th September 1934 were made, does not appear but from a statement made by the appellants in the Chief Court of Oudh, from the arguments and contentions presented before it and the way in which the matter is dealt with by the Court it would appear that they were entered into after the preliminary decree. In any case it is plain that the delivery of the first and second films took place after that date and the third still awaits delivery and has not yet been taken over by the respondents.

On 15th October 1935, the respondents went into liquidation and an Official Liquidator was appointed by the Court. On 29th September 1937, the Official Liquidator filed an application for the passing of the final decree. The appellants resisted this application on the ground that the entire claim of the respondents had been satisfied by the agreements above-mentioned and their fulfilment by putting the films referred to at the disposal of the respondents. In reply the liquidator did not admit knowledge of the agreement of 18th September, maintained it was a nullity and unenforceable, and was made during the pendency of the suit and before the final decree was passed, that no payment of the amount due had been made in the manner set out in the preliminary decree, that the alleged payments or adjustments had not been certified as required under O. 21, R. 2, Civil P. C., that as payment is denied no enquiry as to payment can now be made and finally, that the alleged agreement with regard to the Rs. 75,000 film was never entered into. On these contentions the following issues were framed :

1.—(a) Whether the opposite party can set up the agreement alleged to have been entered into between the parties before the passing of the preliminary decree as an adjustment of the decree? (b) Whether the agreement was enforced after the passing of the preliminary decree? If so, its effect?

2. Whether an enquiry as to any payments made under the alleged agreement can be made in these proceedings?

3. Whether the alleged adjustment which has not been certified can be recognised by the Court?

Certain other issues dealing with an alleged transfer of the decree were also framed but are not material at this stage of the proceedings. The trial of the application was stayed for a time after the issues were framed but came before the Court at a later date and was decided on 23rd May 1940, in favour of the respondents on the two grounds on which reliance was placed by the Official Liquidator, viz.: firstly, that there had been no payment as ordered in the preliminary decree and,

secondly, that the agreement of 18th September 1934, being anterior to the date of the preliminary decree could not be enforced and set up in defence thereafter. The preliminary decree declared the amount due up to 30th May 1935, to be Rs. 83,359-6-11 in all, ordered that the appellants should pay that sum into Court on or before 30th May 1935, or any later date to which the Court might extend the time for payment with future interest at 6 per cent. per annum and further declared that in default of payment as aforesaid the respondents might apply for the sale of the mortgaged property.

The learned Judge held that inasmuch as that decree ordered payment into Court, nothing short of such payment would comply with the decree or be a protection to the appellants against a final order for sale. He accordingly made on 23rd May 1940, a final decree for sale of the mortgaged property. This decision would appear to be correct if the preliminary decree had been passed after an adjustment had been made and all the terms agreed upon by way of adjustment had been carried out before the making of the preliminary decree. In that case the mortgagor's remedy would be to appeal against the preliminary decree. For the reasons hereafter stated, however, the decision is wrong where the adjustment is made or carried out after the preliminary decree has been passed.

From this decree an appeal was taken to the Chief Court of Oudh but was dismissed upon the ground that the agreement of 18th September 1934 was made before and would not affect the preliminary decree and that once the preliminary decree was passed no future adjustments or payments by the mortgagor could be taken into account except possibly (1) sums admittedly paid, (2) sums paid in the presence of the Court, and (3) sums certified. It was held that except in such circumstances the appellants were not even entitled to put forward proof of any payments or adjustments alleged to have been made.

From this judgment the appellants have obtained leave to appeal and have appealed to His Majesty in Council, claiming the right to prove and, if proved, to take credit for the sums and adjustments upon which they rely. Unfortunately, the respondents were not represented on the hearing, but their Lordships have heard a full and careful discussion of the points at issue which apparently have given rise to a conflict of view between various Courts in India. *Prima facie* a debtor should be entitled to take credit for any payments which he can prove to have made in respect of a mortgage debt. The only reason for prohibiting him from doing so would be

that there was some valid law or regulation of the Court to the contrary. Such regulations are however contended to exist and reliance is placed on behalf of the respondents upon Rr. 2, 4 and 5 of O. 34, Civil P. C.

Rule 2 provides that in a suit for foreclosure, if the plaintiff succeeds the Court shall pass a preliminary decree directing that if the defendant pays into Court the sum due within the time fixed the plaintiff shall deliver up the documents of title and if necessary put the defendant in possession of the mortgaged property.

Rule 4 adapts the same procedure to the case of an application for sale and adds that in default of payment in accordance with the preliminary decree the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property be sold.

Rule 5 (1) provides that where on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-r. (3) of this Rule, the defendant makes payment into Court of the amounts due the Court shall pass a final decree or order providing for the delivery up of documents and if necessary re-transfer of the property and that the defendant be put in possession.

Sub-rule (3) provides that where payment in accordance with sub-rule (1) has not been made the Court shall on application made by the plaintiff on that behalf pass a final decree directing that the mortgaged property be sold.

Rules 2 and 4 of this Order, it was said, visualised and the preliminary decree made in this case directed payment into Court, and R. 5 was mandatory in declaring that if that direction was not complied with the Court must pass a final decree for sale.

Admittedly no payment into Court had been made and therefore, it was contended, the Court was obliged to pass a final decree for sale. It was at one time also contended that in any case any payment made in respect of the mortgage debt could not be relied upon unless certified under O. 21, R. 2. But, apart from the question whether the parties could not compromise a decree (as to which see 66 I. A. 84¹), it has again and again been held in India that this rule only applies in execution, that execution does not begin until after a final order for sale has been passed and that therefore the rule has no application when the question is whether or no a final decree for sale should be passed. Their Lordships agree with the Courts in India in this respect.

1. (1939) 26 A.I.R. 1939 P.C. 80:14 Luck. 192: I.L.R. (1939) Kar. P.C. 136: 66 I.A. 84: 180 I.C. 378 (P.C.), Oudh Commercial Bank, Ltd. v. Bind Basni Kuer.

As regards the main argument, their Lordships do not stop to consider the question whether the provisions of R. 34 (O. 34?) are, if they stood alone, sufficiently precise to prohibit the compromise of the preliminary decree in a mortgage suit by payment or adjustment in some way other than that directed by the preliminary decree, since the question of adjustment is specifically dealt with in O. 23, R. 3, which is as follows:

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit."

The appellants contend that this rule makes direct provision for the circumstances of the present case and say that so far from affirming the final decree the Chief Court should have recorded the satisfaction of the mortgage debt and passed a decree in accordance therewith provided it was proved to its satisfaction that the debt had been satisfied, and that to deny the appellants the opportunity of furnishing proof is to act in disregard of the express terms of the rule. This question has given rise to a wide divergence of opinion in the Courts of India. The stricter interpretation which has been adopted by the Chief Court in this case is that the terms of O. 34, R. 5, which have express reference to the making of a final decree in the case of an application for sale in a mortgage suit, override the terms of O. 23, R. 3, which is of general but not of particular application. This view has the support of the Courts in Oudh and Lahore and at any rate in the earlier cases of the Courts of Madras. Their Lordships have been referred to (i) A.I.R. 1927 Oudh 275,² (ii) A.I.R. 1935 Oudh 313,³ (iii) A.I.R. 1936 Oudh 152,⁴ (iv) A.I.R. 1932 Lah. 231,⁵ (v) A.I.R. 1935 Lah. 168,⁶ (vi) A.I.R. 1939 Lah. 79⁷ and (vii) 42 Mad. 61.⁸

One may summarize the decisions in these cases as determining that where the preliminary decree directs payment into Court no other method of payment is permissible: but

2. ('27) 14 A. I. R. 1927 Oudh 275 : 102 I. C. 428, Tirloki Nath Dube v. Sadhu Ram Tewari.
3. ('35) 22 A. I. R. 1935 Oudh 313 : 11 Luck. 116 : 155 I. C. 231, Sewa Ram v. Parbhu Dayal.
4. ('36) 23 A. I. R. 1936 Oudh 152 : 11 Luck. 500 : 158 I. C. 419, Mazbut Singh v. Mt. Indrani.
5. ('32) 19 A. I. R. 1932 Lah. 231 : 136 I. C. 732, Mt. Durga Devi v. Nand Lal.
6. ('35) 22 A.I.R. 1935 Lah. 168 : 158 I.C. 83, Piara Lal v. Bulagi Mal & Sons.
7. ('39) 26 A.I.R. 1939 Lah. 79 : I.L.R. (1939) Lah. 313 : 185 I.C.75, Raja Ram v. Allahabad Bank, Ltd.
8. ('19) 6 A. I. R. 1919 Mad. 792 : 42 Mad. 61 : 48 I. C. 196, Singha Raja v. Pethu Raja.

that the harshness of this doctrine may be diminished in some three or four ways, i. e., (1) acceptance of money in satisfaction or part satisfaction, (2) acknowledgment of payment, (3) payment not into Court but in the presence of the presiding Judge, (4) possibly the payment if certified.

Except in these cases the Court, it is said, cannot take notice of any payment out of Court. The fourth exception even if attention be paid only to the cases referred to above is not easy to accept since cases (i) and (iv) point out that O. 21 R. 2 applies only to cases where execution has begun and execution does not begin until the passing of the final decree. The other two exceptions seem to have been arrived at on no logical basis, but rather upon the injustice which would be perpetrated if they were not recognized. The Courts of Allahabad and Patna appear to have taken a contrary view to those of Oudh and Lahore; the latest Madras case has cast some doubt on the earlier ones and Calcutta seems to take a similar view to that of Allahabad and Patna. Reference may be made to A.I.R. 1936 ALL. 9;⁹ A.I.R. 1939 ALL. 28;¹⁰ A.I.R. 1939 ALL. 174;¹¹ 2 Pat.L.J. 533¹² 14 Pat. 488;¹³ 69 M. L. J. 765¹⁴ and 1917 C. W. N. 920.¹⁵

It is true that the first of these cases leaves open the question whether a mere payment between preliminary and final decree without any adjustment would constitute a discharge of liability when it says:

"Whatever be the correct view on the question whether money paid out of Court in satisfaction of the decree in whole or part can be recognised by a Court when it is invoked to pass a final decree, it cannot refuse to act on O. 23 R. 3 if the conditions required are fulfilled."

In that case the Court pointed out that there had been not a mere payment but an adjustment. Even so limited an application of O. 23, R. 3 would suffice to establish the appellants' contention in the present case since adjustment followed by performance of the terms agreed is alleged.

The other cases, however, recognise that the

9. ('36) 23 A. I. R. 1936 All. 9 : 58 All. 565 : 160 I. C. 373, Inayat Khan v. Harbans Lal.
10. ('39) 26 A. I. R. 1939 All. 28 : 179 I. C. 70, Munni Singh v. Collector of Benares.
11. ('39) 26 A. I. R. 1939 All. 174 : 180 I. C. 244, Ram Niwas v. Ram Dayal.
12. ('17) 4 A.I. R. 1917 Pat. 577 : 2 Pat. L.J. 533 : 40 I. C. 138, Jogendra Prasad Narain Singh v. Gouri Shankar Prasad Sahu.
13. ('35) 22 A. I. R. 1935 Pat. 385 : 14 Pat. 488 : 155 I. C. 976, Harihar Prasad Narain Singh v. Gopal Saran Narain Singh.
14. ('36) 23 A. I. R. 1936 Mad. 34 : 59 Mad. 188 : 160 I. C. 270 : 69 M. L. J. 765 (F. B.), Palaniappa Chettiar v. Narayanan Chettiar.
15. ('18) 5 A. I. R. 1918 Cal. 472 : 40 I. C. 845 : (1917) 21 C. W. N. 920, Piran Bibi v. Jitendra Mohun Mukerjee.

suit continues up to final decree and consequently any adjustment or satisfaction up to that time must be taken into account. A decree-holder need not of course agree to any adjustment or accept payment otherwise than into Court but in their Lordships' opinion it is open to the debtor to allege and prove that an adjustment has taken place or payment in whole or in part has been made and received. Indeed to hold otherwise is to disregard the opening words of the Order, (O. 23, R. 3.) viz. : "Where it is proved to the satisfaction of the Court" Their Lordships see no qualification to the wide terms of the Order (O. 23, R. 3) nor any grounds for limiting its application. Admittedly the suit continues until the final decree is passed and there is no time limit for recording the agreement arrived at as there is under O. 21, R. 2. In the present case, therefore, the Judge of the civil Court should have satisfied himself as to whether any adjustment had been arrived at or payment made, and followed this enquiry by an appropriate decree under which a finding of full satisfaction would lead to the dismissal of the suit and partial satisfaction to a diminution of the indebtedness whereas a finding that there had been no adjustment or satisfaction would be followed by a final decree for sale. Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, the final decree set aside and that the Subordinate Court should be directed to hear evidence and decide whether or not satisfaction wholly or in part has been made in respect of the mortgage debt and to pass a decree accordingly.

The respondents must pay the costs of the appellants before their Lordships and in the Courts in India.

R.K.

Appeal allowed.

Solicitors for Appellants — *T. L. Wilson & Co.*
Respondents *Ex parte.*

*** A. I. R. (32) 1945 Privy Council 156**

(From Federal Court: ('43) 30 A. I. R. 1943 F. C. 75)

17th July 1945

LORD CHANCELLOR, LORDS THANKERTON,
PORTER AND GODDARD AND SIR
MADHAVAN NAIR

Emperor

v.

Sibnath Banerji and others—Respondents.

Privy Council Appeal No. 44 of 1944; Federal Court Appeal No. 3 of 1943.

(a) Criminal P. C. (1898), Ss. 491, 404 — Discharge under S. 491 — No appeal lies under Criminal Procedure Code — S. 205, Government of India Act, is however exception to S. 404 of Code and hence appeal under S. 205, Government of India Act, is competent.

An order of discharge under S. 491, Criminal P.C.,

is final and not subject to appeal, under the Criminal Procedure Code. But S. 205, Government of India Act relates to both civil and criminal jurisdiction of the High Courts. Hence, in the absence of an express exception of habeas corpus cases, and having in view the terms and purpose of S. 205, such cases are not excluded from the operation of S. 205. Section 205 of the Act of 1935 provides one of the exceptions referred to in S. 404, Criminal P. C.: (1890) 15 A. C. 506 and ('39) 26 A. I. R. 1939 F. C. 43, *Rel. on*; ('27) 14 A. I. R. 1927 Cal. 496; 6 Beng. L. R. 392 and ('39) 26 A. I. R. 1939 P. C. 213, *Ref.*

[P 158 C 2; P 159 C 1]

* (b) Defence of India Act (1939), S. 2 — R. 26, Defence of India Rules, is not invalid: I. L. R. 1943 Kar. F. C. 26 = I. L. R. 1944 Bom. 183 = (1943) F. C. R. 49 = ('43) 30 A. I. R. 1943 F. C. 1 = 207 I. C. 1 (F. C.), *OVERRULED*.

The function of sub-s. (2) of S. 2 is merely an illustrative one; the rule-making power is conferred by sub-s. (1), and "the rules" which are referred to in the opening sentence of sub-s. (2) are the rules which are authorised by, and made under sub-s. (1); the provisions of sub-s. (2) are not restrictive of sub-s. (1). The general language of sub-s. (1) amply justifies the terms of R. 26, and hence R. 26 does not go beyond the rule-making power and is not invalid: I. L. R. 1943 Kar. F. C. 26 = I. L. R. 1944 Bom. 183 = (1943) F. C. R. 49 = ('43) 30 A. I. R. 1943 F. C. 1 = 207 I. C. 1 (F. C.), *OVERRULED*. [P 160 C 1]

* (c) Government of India Act (1935), S. 59 (2) — Presumption of correctness of official orders — Extent of, explained — Courts can investigate validity of orders, though burden is heavy on person challenging order.

Sub-section (2) of S. 59 only relates to one specified ground of challenge, namely, that the order or instrument was not made or executed by the Governor. It is quite a different thing to question the accuracy of a recital contained in a duly authenticated order, particularly where that recital purports to state as a fact the carrying out of a condition necessary to the valid making of that order. In the normal case, the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by a Court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a *prima facie* case that the recital is not accurate. Hence the Court has jurisdiction to investigate the validity of the orders. [P 161 C 1]

* (d) Defence of India Rules (1939), R. 26 — Governor need not be personally satisfied — S. 2 (5), Defence of India Act, does not exclude ordinary rules of business framed under Government of India Act, 1935, S. 59: I. L. R. (1943) Kar. F. C. 103 = 1944 F. C. R. 1 = ('43) 30 A. I. R. 1943 F. C. 75 = 211 I. C. 241, *REVERSED*.

The Governor need not be personally satisfied as to the matters set out in R. 26. Section 2 (5) is merely supplementary, and affords no ground for excluding the ordinary methods by which the Provincial Government's executive business is authorised to be carried on by Chap. 2 of Part 3, Government of India Act, 1935. Matters as those which fell to be dealt with by the Governor under R. 26 can be dealt with by him in the normal manner in which the executive business of the Provincial Government was carried on under the provisions of Chap. 2 of Part 3 of the Act of 1935, and, in particular, under the provisions of S. 49 and the Rules of business made under S. 59: I. L. R. (1943) Kar. F. C. 103 = 1944 F. C. R. 1 = ('43) 30 A. I. R. 1943 F. C. 75 = 211 I. C. 241, *REVERSED*. [P 161 C 2; P 163 C 1]

* (e) Government of India Act (1935), Ss. 49 (2) and 124 (2) — "Executive" in Part 3, Chap. 2 includes both decision as to action and carrying out of decision — S. 49 (2) does not restrict its operation to matters within power of Provincial Legislature nor does it give maximum limit — Matters under Defence of India Rules, R. 26 can be dealt with by Governor; I. L. R. 1943 Kar. F. C. 103 = 1944 F. C. R. 1 = ('43) 30 A. I. R. 1943 F. C. 75 = 211 I. C. 241 (F.C.), *REVERSED*.

The provisions of Chap. 2 of Part 3 of the Government of India Act of 1935 as to the Provincial Executive and its executive authority use the term "executive" in the broader sense as including both a decision as to action and the carrying out of such decision. Section 49 (2) does not limit the operation of the section to matters with respect to which the Provincial Legislature has power to make laws. The subject-matter of the Defence of India is within those powers. Sub-s. (2) of S. 49 provides an extensible limit and not a maximum limit, and the provisions of sub-s. (2) of S. 124 afford a means of such extension: I. L. R. (1943) Kar. F. C. 103 = 1944 F. C. R. 1 = ('43) 30 A. I. R. 1943 F. C. 75 = 211 I. C. 241 (F.C.), *REVERSED*. [P 162 C 1,2]

* (f) Government of India Act (1935), S. 49 — Home minister: I. L. R. (1939) 2 Cal. 411 = ('39) 26 A. I. R. 1939 Cal. 529 = 183 I. C. 349 (S. B.), *OVERRULED*.

The Home Minister is an officer subordinate to the Governor within the meaning of S. 49 (1): I. L. R. (1939) 2 Cal. 411 = ('39) 26 A. I. R. 1939 Cal. 529 = 183 I. C. 349 (S. B.), *OVERRULED*. [P 163 C 1]

(g) Defence of India Rules (1939), Rr. 26 and 129 — Persons detained under R. 129 ordered to be detained under R. 26 as matter of routine on mere recommendation of police — Orders are invalid.

Where persons who are detained under R. 129 are ordered to be detained under R. 26 as a matter of routine on a mere recommendation of the police, the orders are bad in law as it does not appear that the matter was considered by the Governor at any stage, much less that at the time the order was made he was satisfied with regard to any of the matters set out in the order of detention.

Held that the inaction of the Home Minister on the later submission of the fuller materials to him could not cure the invalidity of the order. [P 164 C 1]

Sir Walter Monckton, W. Wallach and B. McKenna — for the Crown.

D. N. Pritt and V. K. Krishna Menon — for Respondents.

Lord Thankerton — This appeal is brought by leave of the Federal Court of India, from a judgment of that Court (Spens C.J., Varadachariar and Zafrulla Khan JJ.) dated 31st August 1943, dismissing eight appeals by the Crown against orders and judgments of a Divisional Bench of three Judges (Mitter and Sen JJ., Khundkar J. dissenting) of the High Court of Judicature at Fort William in Bengal, dated 3rd June 1943. The orders and judgments of the High Court were made upon applications under S. 491, Criminal P. C., for directions in the nature of habeas corpus on behalf of nine persons, detained in various jails in pursuance of orders made under R. 26, Defence of India Rules, on various dates from 24th October 1940 to 8th March 1943. These orders and judgments directed the release of

the applicants. Of the nine original applicants, eight are called as respondents in the present appeal, but their Lordships were informed that two of the respondents had been released, namely, Narendra Nath Sen Gupta, respondent 4, on a date before the judgment of the Federal Court, and Bijoy Singh Nahar, respondent 2, after the judgment of the Federal Court. The remaining six respondents, with whom this appeal is now concerned, are under detention by virtue of orders made under Bengal Regulation, 3 of 1818. Having regard to the known and well-settled principle of the English law that a discharge, or an order directing discharge, under a writ of habeas corpus is final and not subject to appeal, and the importance of preserving safeguards of the liberty of the subject, their Lordships asked for arguments of counsel on the competency, in the present case, of the appeals by the Crown from the High Court to the Federal Court, which might equally affect the competency of the further appeal to this Board. It is sufficient to refer to the decision of the House of Lords in (1890) 15 A. C. 506,¹ where the law of England on this matter is fully dealt with.

In the present case, the appeals have proceeded under Ss. 205 and 208, Government of India Act, 1935. Section 205 provides as follows:

"205.—(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate has been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave."

On the application of the Crown, the High Court granted certificates under S. 205 (1) for leave to appeal to the Federal Court. After the decision of the Federal Court, leave was given by them under S. 208 (b) to appeal to His Majesty in Council. Their Lordships have come to the conclusion that, in view of the special terms of S. 205, the appeals in the present case were competent. In (1890) 15 A. C. 506¹ it was held that the right of appeal given by S. 19, Judicature Act 1873, did not include an appeal against an order of discharge made upon a writ of habeas corpus. Lord Halsbury L. C., says:

1. (1890) 15 A.C. 506 : 60 L. J. Q. B. 89 : 63 L. T. 392 : 39 W. R. 145, *Cox v. Hakes*.

"My Lords, I have insisted at some length upon the peculiarities of the procedure, because I think one cannot suppose that the Legislature intended to alter all the procedure by mere general words without any specific provision as to the practice under the writ of Habeas Corpus or the statutes which from time to time have regulated both its issue and its consequences. My Lords, I do not deny that the words of S. 19 literally construed are sufficient to comprehend the case of an order of discharge made upon an application for discharge upon a writ of Habeas Corpus; but it is impossible to contend that the mere fact of a general word being used in a statute precludes all enquiry into the object of the statute or the mischief which it was intended to remedy."

In their Lordships' opinion, the condition of the law of habeas corpus in India, and the purpose and express words of S. 205, Government of India Act, 1935, afford a contrast to the condition of the English law and the object and general terms of S. 19 of the Judicature Act of 1873. The history of the matter is shortly stated by Sir George Rankin, then Chief Justice, in his admirable judgment in 54 Cal. 727,² from which the following quotation may be made: (at p. 749),

"I proceed, therefore, to enquire whether according to the law in India as it now stands there is or is not power in the High Court to grant the writ of Habeas Corpus at common law independently of S. 491, Criminal P. C. Now in 1870 in 6 Beng. L. R. 392,³ Norman J. held that the High Court could issue the Habeas Corpus outside the original jurisdiction to the Superintendent of the Jail at Alipore. In 1872 the Code of Criminal Procedure (Act 10 of 1872) was enacted which gave the right to European British subjects detained in custody whether within the limits of the High Court's original jurisdiction or outside those limits to apply for an order directing the person detaining him to bring him before the High Court, in other words for an order under S. 81 in the nature of Habeas Corpus. Section 82 provided that 'Neither the High Courts nor any Judge of such High Courts shall issue any writ of *Habeas Corpus*, *Main prise*, *De homine replegiando*, nor any other writ of the like nature beyond the Presidency towns.' This prohibition cannot in my opinion be confined to the case of European British subjects nor has this been contended before us. In 1875, the High Courts' Criminal Procedure Act (10 of 1875) in S. 148 set out various purposes for which an order in the nature of Habeas Corpus might be made and it gave power to the High Courts to make such orders in the case of persons within the limits of their original jurisdiction. It went on to say that 'neither the High Court nor any Judge thereof shall hereafter issue any writ of Habeas Corpus for any of the above purposes.' Certain particular matters were excepted, it being stated that nothing in this section applies to a person detained under Bengal Regulation 3 of 1818 and certain other Regulations. But it is quite clear that for the purposes provided for by S. 148, the intention was that relief should be granted under the section and recourse should not be had to the old prerogative writs. . . . The subsequent history of the matter is shortly this, that when the Code of Criminal Procedure was amended in 1882 the Acts of 1872 and 1875 were comprised in Sch. 1

as enactments repealed by S. 2 'but not so as to restore any jurisdiction or form of procedure not existing or followed' on 1st January 1883 (Act 10 of 1882). The matter remained very much in the same position until 1923, when a right was given to everybody within the appellate jurisdiction of this Court to make an application under S. 491 of the present Criminal Procedure Code. The question which arises is whether for any of the purposes mentioned in what is now S. 491, it is open to an applicant still to say that he will make his application independently of that section altogether for the prerogative writ of Habeas Corpus on the civil side of the High Court. I observe that it has been stated in certain cases that if there is to be any question of the abolition of this right then the Legislature must say so in the most specific terms. Whether that be a correct view in a matter of procedure of this kind need not be discussed for the Legislature has used the most specific terms; and it is plain that the Indian Legislature never intended that the Courts in giving relief of this character should for any of the purposes mentioned in S. 491 be at liberty to act under it or under the old procedure."

In the recent case in 66 I. A. 222,⁴ this judgment was approved by the Board, and it was held that, in cases covered by S. 491, the power to issue a common law writ of habeas corpus in British India had been taken away by legislation, and the powers conferred by S. 491 substituted therefor. The present applications were under S. 491. Under S. 404, Criminal P. C., no appeal lies from any judgment or order of a criminal Court except as provided for by the Court or by any other law for the time being in force. There is no provision in the Code for an appeal from an order made under S. 491, there is no conviction or acquittal in such proceedings, and S. 417, which taken along with the new S. 411A (2) enacted by S. 2, Amending Act of 1943 (Act 26 of 1943) allows an appeal on behalf of the Government only from an order of acquittal is equally inapplicable. Accordingly, as regards appeal, the position under the Criminal Procedure Code as to proceedings under S. 491 is in effect the same as the position stated in (1890) 15 A. C. 506.¹

Turning again to S. 205, Government of India Act of 1935, their Lordships are clearly of opinion that the section relates to both the civil and criminal jurisdiction of the High Courts; the terms of sub-s. (2) of S. 210 appear to put this beyond doubt, and their Lordships agree with the decision of the Federal Court to this effect in (1939) F. C. R. 159.⁵ Further, the width of the language used is striking, viz., "any judgment, decree or final order of a High Court," and "it shall be the duty of every High Court in British India to consider

2. ('27) 14 A.I.R. 1927 Cal. 496 : 54 Cal. 727 : 102 I. C. 647, Girindra Nath v. Birendra Nath.

3. ('70) 6 Beng. L. R. 392, In the matter of Ameer Khan.

4. ('39) 26 A.I.R. 1939 P. C. 213 : I.L.R. (1939) Mad. 744 : I.L.R. (1939) Kar. P. C. 324 : 66 I. A. 222 : 182 I.C. 551 (P.C.), Matthen v. District Magistrate, Trivandrum.

5. ('39) 26 A.I.R. 1939 F. C. 43 : I.L.R. (1940) Lah. 400 : I. L. R. (1939) Kar. F. C. 132 : 1939 F.C.R. 159 : 181 I. C. 317 (F.C.), Hori Ram v. Emperor.

in every case." The purpose of the provision is to confer a right of appeal in every case that involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder. The object is clearly to secure uniformity of decision in every High Court by the determination of a Court superior to them all. On the most moderate view of the matter, the securing of that object is at least as important in cases of habeas corpus, in which such questions are very apt to arise, as in other cases. In the absence of an express exception of habeas corpus cases, and having in view the terms and purpose of the section, their Lordships are unable to limit the terms of the section by mere construction so as to exclude these cases from its operation. Accordingly, S. 205 of the Act of 1935 provides one of the exceptions referred to in S. 404, Criminal P. C. Their Lordships are therefore of opinion that the appeals from the High Court were competent, and it follows that the appeal to His Majesty in Council was also competent, and they will proceed to deal with the appeal on the merits.

The present applications under S. 491, Criminal P. C., were filed on 24th April 1943, two days after the decision of the Federal Court in *I.L.R. (1944) Bom. 183*,⁶ under which it was held, reversing the decision of the Bombay High Court refusing to make an order under S. 491 for release of the applicants, that R. 26, Defence of India Rules was ultra vires, and was not warranted by the Defence of India Act, 1939. On 28th April 1943, the Governor-General made and promulgated Ordinance No. 14 of 1943 under S. 72 of Sch. 9, Government of India Act, 1935. By S. 2 of the Ordinance, a new clause was substituted for cl. (x) of S. 2 (2), Defence of India Act, 1939. Section 3 of the Ordinance provided

"that no order heretofore made against any person under R. 26, Defence of India Rules shall be deemed to be invalid or shall be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said rule was made be lawfully conferred by a rule made or deemed to have been made under S. 2, Defence of India Act, 1939."

The amendment effected by S. 2 of the Ordinance removed the grounds on which the Federal Court had pronounced R. 26 to be ultra vires. The terms of R. 26 were not altered by the Ordinance. In the present applications, *I.L.R. (1944) Bom. 183*⁶ was taken as binding on them by both the High Court and the Federal Court and the new Ordinance No. 14 was the main object of challenge by the applicants. But before this Board, the Crown has placed in the forefront a challenge

of the correctness of the decision in *I.L.R. (1944) Bom. 183*⁶ and success in that contention would vindicate the validity of R. 26 and would supersede any consideration of Ordinance No. 14. It is therefore necessary to dispose of this question first.

The material portions of S. 2, Defence of India Act, 1939 (Act 35 of 1939), as amended by S. 2, Defence of India (Amendment) Act, 1940 (Act 19 of 1940), are as follows:

"2.—(1) The Central Government may, by notification in the Official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by sub-s. (1), the rules may provide for, or may, empower any authority to make orders providing for all or any of the following matters, namely:

(v) preventing the spreading without lawful authority or excuse of false reports or the prosecution of any purpose likely to cause disaffection or alarm, or to prejudice His Majesty's relations with foreign powers or with States in India, or to prejudice the maintenance of peaceful conditions in the tribal areas, or to promote feelings of enmity and hatred between different classes of His Majesty's subjects:

(x) the apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the defence of British India, the prohibition of such person from entering or residing or remaining in any area, and the compelling of such person to reside and remain in any area, or to do, or abstain from doing anything."

The material part of R. 26, as it has stood since 1940, is as follows:

"26.—(1) The Central Government or the Provincial Government, if it is satisfied with respect to any particular person that with a view to prevent him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions, in tribal areas, or the efficient prosecution of the war it is necessary so to do, may make an order,

(a)

(b) directing that he be detained."

In *I. L. R. (1944) Bom. 183*⁶ the Judgment of the Federal Court was delivered by Gwyer C. J., who first dealt with the main argument of the appellant, which had been rejected by the High Court, and proceeded (at p. 206):

"We, therefore, reject the main argument addressed to us on behalf of the appellant, and, if there were nothing more in the appeal, we should dismiss it without further discussion. There is, however, another aspect of the case, which was not argued until the Court itself drew the attention of counsel to it; for it seemed to us that it was open to question whether R. 26 itself in its present form was within the rule-making powers conferred by the Defence of India Act. If it is not within those powers, then it must be held void and inoperative,

6. (43) 30 A.I.R. 1943 F. C. 1 : *I.L.R. (1943) Kar. F. C. 26* : *I.L.R. (1944) Bom. 183* : 1943 F. C. R. 49; 207 I. C 1 (F.C.), *Keshav Talpade v. Emperor*.

either in whole or in part; and the orders made under it will be similarly open to challenge."

The learned Judge then proceeded to discuss paras. (v) and (x) of S. 2 (2) of the Act, and for reasons fully stated by him, he came to the conclusion that Rule 26 was not within the powers conferred by sub-s. (2) of S. 2, and (p. 214) he stated:

"The Legislature having set out in plain and unambiguous language in para. (x) the scope of the rules which may be made providing for apprehension and detention in custody it is not permissible to pray in aid the more general words in S. 2 (1) in order to justify a rule which so plainly goes beyond the limits of para. (x); though if para. (x) were not in the Act at all, perhaps different considerations might apply. . . . We are compelled therefore to hold that R. 26 in its present form goes beyond the rule-making powers which the Legislature has thought fit to confer upon the Central Government and is for that reason invalid."

Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of sub-ss. (1) and (2) of S. 2, Defence of India Act, and counsel for the respondents in the present appeal was unable to support that statement, or to maintain that R. 26 was invalid. In the opinion of their Lordships, the function of sub-s. (2) is merely an illustrative one; the rule-making power is conferred by sub-s. (1), and "the rules" which are referred to in the opening sentence of sub-s. (2) are the rules which are authorised by, and made under, sub-s. (1); the provisions of sub-s. (2) are not restrictive of sub-s. (1), as indeed is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-s. (1)." There can be no doubt — as the learned Judge himself appears to have thought — that the general language of sub-s. (1) amply justifies the terms of R. 26, and avoids any of the criticisms which the learned Judge expressed in relation to sub-s. (2).

Their Lordships are therefore of opinion that I. L. R. (1944) Bom. 183⁶ was wrongly decided by the Federal Court, and that R. 26 was made in conformity with the powers conferred by sub-s. (1) of S. 2, Defence of India Act. It is, accordingly, unnecessary for their Lordships to consider whether R. 26 was not also within paras. (v) and (x) of sub-s. (2) of S. 2, contrary to the opinion of the Federal Court, and their Lordships express no opinion on the matter. As already stated, their Lordships are also relieved from any consideration of Ordinance 14 of 1943. As regards the remaining questions, counsel for the Crown stated them under two main heads, viz., first, whether the orders of detention can be questioned in view of the provisions of S. 59 (2), Government of India Act, and S. 16, Defence of India Act, and secondly, assuming that they can be so questioned, whether there were materials on

which the Courts below could properly decide that the orders were not made in conformity with R. 26. The order for detention of respondent 1, which is typical of the other cases, is as follows:

"Calcutta, the 27th October 1942.

Whereas the person known as Shibnath Banerjee, M. L. A., son of late Dwarikanath Banerjee of 3/1 Kali Banerjee Lane, Howrah, is detained in the Howrah Jail under the provision in R. 129, Defence of India Rules;

And whereas the Governor is satisfied that, with a view to preventing the said person from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of the war, it is necessary to make the following orders to continue his detention;

Now, therefore, in exercise of the powers conferred by cl. (b) of sub-r. (1) and sub-r. (5) of R. 26, Defence of India Rules, the Governor is pleased to direct—

(a) that the said person shall until further orders be detained;

(b) that until further orders the said person shall continue to be detained in the Howrah Jail; and

(c) that during such detention the said person shall be subject to the conditions laid down in the Bengal Security Prisoners Rules, 1940.

By order of the Governor,

S. B. Bapat,

Addl. Dy. Secy. to the Govt. of Bengal."

Except that in the case of respondent 6, Niharendu Dutt Majumdar, there was no previous arrest under Rule 129 and that in some cases the order was signed on behalf of the Governor by "A. E. Porter, Addl. Secy. to the Govt. of Bengal," there is no material difference from the above order in the case of the remaining orders. The Crown maintained that the orders being on their face regular and in conformity with the language of the rule, it was not open to the Court to investigate their validity any further, and relied on the statutory provisions already referred to. It should, however, be stated, that R. 3 (1), Defence of India Rules provides that the General Clauses Act, 1897, is to apply to the interpretation of these rules as it applies to the interpretation of a Central Act, and that, under S. 3 (43a), General Clauses Act,

"(43a) 'Provincial Government,' as respects anything done or to be done by the 'Provincial Government' after the commencement of Part 3, Government of India Act, 1935, shall mean —

(a) in a Governor's Province, the Governor acting or not acting in his discretion, and exercising or not exercising his individual judgment, according to the provision in that behalf made by and under the said Act"

Section 59 (2), Government of India Act, on which the Crown relies, provides:

"Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor."

In the opinion of their Lordships, the contention of the Crown goes too far, as the sub-section only relates to one specified ground of challenge, namely, that the order or instrument was not made or executed by the Governor. Their Lordships agree with the statement by the learned Chief Justice of the Federal Court, viz.:

"It is quite a different thing to question the accuracy of a recital contained in a duly authenticated order, particularly where that recital purports to state as a fact the carrying out of what I regard as a condition necessary to the valid-making of that order. In the normal case the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by a Court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a *prima facie* case that the recital is not accurate."

On this point the Federal Court was unanimously against the Crown. The other statutory provision relied on by the Crown before the Board was not, it appears, brought before the Federal Court; it was S. 16, Defence of India Act, which provides as follows:

"16.—(1) No order made in exercise of any power conferred by or under this Act shall be called in question in any Court.

(2) Where an order purports to have been made and signed by any authority in exercise of any power conferred by or under this Act, a Court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that authority."

Sub-section (1) assumes that the order is made in exercise of the power, which clearly leaves it open to challenge on the ground that it was not made in conformity with the power conferred, heavily though the burden of proof may lie on the challenger, as stated by the Chief Justice in the passage just cited. Sub-section (2) raises a presumption of fact, which may be displaced, though here again the burden is likely to be heavy. Section 4, Evidence Act, provides:

"Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."

Accordingly, the contention of the Crown that the Court has no jurisdiction to investigate the validity of the orders fails. On construction of R. 26, the majority of the Judges of the Federal Court held that the Governor must be personally satisfied as to the matters therein set out, and that, in view of the admission by the Crown that in none of the cases before them had the Governor himself considered the case, the orders for detention were not in conformity with the Rule. They based their conclusion mainly on the power of delegation (which has admittedly not been exercised in the present case) conferred by

sub-s. (5) of S. 2, Defence of India Act, which provides as follows:

"(5) A Provincial Government may by order direct that any power or duty which by rule made under sub-s. (1) is conferred or imposed on the Provincial Government, or which, being by such rule conferred or imposed on the Central Government, has been directed under sub-s. (4) to be exercised or discharged by the Provincial Government, shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by any officer or authority, not being (except in the case of a Chief Commissioner's Province) an officer or authority subordinate to the Central Government."

The learned Chief Justice disagreed, holding that sub-s. (5) was merely supplementary, and afforded no ground for excluding the ordinary methods by which the Provincial Government's executive business was authorised to be carried on by Chap. 2 of Part 3, Government of India Act, 1935. Their Lordships are of opinion that the learned Chief Justice was right. It will be remembered that the definition of Provincial Government in S. 3 (43A), General Clauses Act, refers one to the provisions of the Government of India Act, for the action or non-action of the Governor, and this takes one to Chap. 2 of Part III, which is headed "The Provincial Executive—The Governor". The material sections are as follows:

"49. (1) The executive authority of a Province shall be exercised on behalf of His Majesty by the Governor, either directly or through officers subordinate to him, but nothing in this section shall prevent the Federal or the Provincial Legislature from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor any functions conferred by any existing Indian law on any Court, Judge, or officer or any local or other authority.

(2) Subject to the provisions of this Act, the executive authority of each Province extends to the matters with respect to which the Legislature of the Province has power to make laws."

"50. (1) There shall be a council of ministers to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion:

Provided that nothing in this sub-section shall be construed as preventing the Governor from exercising his individual judgment in any case where by or under this Act he is required so to do.

(2) The Governor in his discretion may preside at meetings of the council of ministers.

(3) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Act required to act in his discretion or to exercise his individual judgment, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion, or ought or ought not to have exercised his individual judgment."

"52. (1) In the exercise of his functions the Governor shall have the following special responsibilities, that is to say:

(a) the prevention of any grave menace to the peace or tranquillity of the Province or any part thereof;

(3) If and in so far as any special responsibility of the Governor is involved, he shall, in the exercise of his functions, exercise his individual judgment as to the action to be taken."

"59. (1) All executive action of the Government of a Province shall be expressed to be taken in the name of the Governor.

(Sub-section (2), already quoted.)

(3) The Governor shall make rules for the more convenient transaction of the business of the Provincial Government, and for the allocation among ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Act required to act in his discretion.

(4) The rules shall include provisions requiring ministers and secretaries to Government to transmit to the Governor all such information with respect to the business of the Provincial Government as may be specified in the rules, or as the Governor may otherwise require to be so transmitted, and in particular requiring a minister to bring to the notice of the Governor, and the appropriate secretary to bring to the notice of the minister concerned and of the Governor, any matter under consideration by him which involves, or appears to him likely to involve, any special responsibility of the Governor.

(5) In the discharge of his functions under sub-s. (2), (3) and (4) of this section the Governor shall act in his discretion after consultation with his ministers."

Rules of Business have been framed by the Governor of Bengal under S. 59, under which it is not disputed that questions of detention fall to be transacted in the Home Department. Under R. 12 all orders or instruments made or executed by or on behalf of the Government of Bengal are to be expressed to be made by or by order of the Governor of Bengal; and under R. 13 save in cases of special authorization, every order or instrument of the Government of Bengal is to be signed by either a Secretary (an Additional Secretary), a Joint Secretary, a Deputy Secretary, an Under-Secretary or an Assistant-Secretary to the Government of Bengal, and such signatures are to be deemed to be the proper authentication of such orders or instruments.

In the first place, their Lordships observe that the provisions of Chap. 2 of Part. 3 of the Act of 1935 as to the Provincial Executive and its executive authority use the term "executive" in the broader sense as including both a decision as to action and the carrying out of such decision. Counsel for the respondents submitted a contention, which the majority of the learned Judges in the Federal Court had accepted, based on sub-s. (2) of S. 49 of the Act of 1935, to the effect that the sub-section limited the operation of the section to matters with respect to which the Provincial Legislature has power to make laws, and that the subject-matter of the Defence of India was not within those powers. The learned Judges, in confirmation of this view, referred to sub-s. (2) of S. 124, which provides that "an Act of the Federal Legislature may, notwithstanding that it relates to a matter with respect to

which a Provincial Legislature has no power to make laws, confer powers and impose duties or authorise the conferring of powers and the imposition of duties upon a Province or officers and authorities thereof."

Their Lordships are unable to agree with such a narrow reading of these provisions, which would involve the necessity of the Federal Legislature making provision in each case for the executive machinery to carry out the powers and duties so imposed, instead of using the existing Provincial machinery. This view is supported by sub-s. (4) of S. 124, which provides *inter alia* that where an Act of the Federal Legislature, by virtue of sub-s. (2), confers powers and imposes duties upon a Province or officers and authorities thereof in relation to a matter with respect to which a Provincial Legislature has no power to make laws, the Federation is to pay to the Province such sum as is agreed, or determined by arbitration, in respect of any extra costs of administration incurred by the Province in connexion with exercise of those powers and duties. This appears to contemplate extra costs incurred by the existing machinery of Provincial Administration. Their Lordships construe sub-s. (2) of S. 49 as providing an extensible limit and not a maximum limit, and the provisions of sub-s. (2) of S. 124 as affording a means of such extension. But, further, their Lordships construe the incorporation of the General Clauses Act, both in the Defence of India Act, and in the Defence of India Rules, with its reference in S. 3 (43a) to the provisions of Part 3 of the Act of 1935 as to the acting or non-acting of the Provincial Governor, as necessarily embodying the relevant provisions of Chap. 2 of Part 3, including in particular S. 49.

It is for the same reasons that their Lordships are unable to accept the respondents' contention, also agreed to by the majority Judges in the Federal Court, that the provision of sub-s. (5) of S. 2, Defence of India Act, provides the only means by which the Governor can relieve himself of a strictly personal function. Their Lordships would also add, on this contention, that sub-s. (5) of S. 2 provides a means of delegation in the strict sense of the word, namely, a transfer of the power or duty to the officer or authority defined in the sub-section, with a corresponding divestiture of the Governor of any responsibility in the matter, whereas under S. 49 (1) of the Act of 1935 the Governor remains responsible for the action of his subordinates taken in his name.

The respondents next contended that, assuming that S. 49 did apply, this question was one which involved a special responsibility of the Governor within the meaning of S. 52 (1)

(a) of the Act of 1935, and therefore required the individual judgment of the Governor. In their Lordships' opinion, they are excluded from considering the somewhat debatable question whether the present matter does fall within head (a) of S. 52 (1), by the provisions of S. 50 (3), as the contention of the respondents is that the Governor should have exercised his individual judgment. Nor is it necessary for their Lordships to consider whether "individual judgment" excludes the operation of S. 49 (1). So far as it is relevant in the present case, their Lordships are unable to accept a suggestion by counsel for the respondents that the Home Minister is not an officer subordinate to the Governor within the meaning of S. 49 (1), and so far as the decision in *I.L.R. (1939) 2 Cal. 411*,⁷ decides that a minister is not such an officer their Lordships are unable to agree with it. While a minister may have duties to the Legislature, the provisions of S. 51 as to the appointment, payment and dismissal of ministers, and S. 59 (3) and (4) of the Act of 1935, and the Business Rules made by virtue of S. 59, place beyond doubt that the Home Minister is an officer subordinate to the Governor.

Their Lordships are therefore in agreement with the learned Chief Justice of the Federal Court that such matters as those which fell to be dealt with by the Governor under R. 26 could be dealt with by him in the normal manner in which the executive business of the Provincial Government was carried on under the provisions of Chap. 2 of Part 3 of the Act of 1935, and, in particular, under the provisions of S. 49 and the rules of business made under S. 59.

There remain the criticisms on the manner in which the individual cases of detention have been dealt with. The six cases with which this appeal is concerned are the cases of respondents 1, 3, 5, 6, 7 and 8. In view of the opinions already expressed by their Lordships, the orders for detention in each of these cases must be taken as *ex facie* regular and proper, and it follows, as already stated, that there is a heavy burden on the respondents to displace the presumption enacted by S. 16 (2), Defence of India Act. The respondents were enabled to raise the question as to whether the Governor was bound to give his personal consideration to the matter, by reason of the Crown's admission that he had not in fact done so in any of these cases. They were also able to raise a question as to the so-called routine order of 1st October 1942 because of Mr. Porter's admission in his affidavit. The

majority of the Federal Court held all the detention orders to be bad because of the first of these admissions, though they also deal with the routine order, and criticise adversely the whole procedure. The learned Chief Justice agreed with the majority as to the cases which were subject to the routine order; he disagreed as to the necessity for personal satisfaction of the Governor, holding that the procedure authorised by S. 49 was available to the Governor, but he held that the routine order vitiated the orders as to which it operated. One of these three cases—that of respondent 2, Bijoy Singh Nahar, is not before the board, as he was released shortly after the judgment of the Federal Court. On the other hand, as regards the cases of the present respondents 3, 6, 7 and 8, he stated that he was unable to find in the evidence anything which established even a *prima facie* case that the orders under R. 26 had been improperly made or to contradict the accuracy of the narrative of the orders. Thereby he differed from the majority of the Court as regards these cases.

The evidence before the Federal Court consisted of affidavits by the respondents, the counter affidavit by Mr. Porter, Additional Home Secretary to the Bengal Government, and certain statements and answers regarding detention under R. 26 given by the Home Minister, Bengal, in the Bengal Legislative Assembly. In common with the Chief Justice of the Federal Court, their Lordships have been unable to find anything—apart from the routine order—in these statements and answers of the Home Minister which affords evidence of improper procedure in the individual cases before the Court, even assuming that such evidence was admissible, which, in the opinion of their Lordships, was at least open to doubt. It is the evidence of Mr. Porter that establishes the application of the routine order in some of these individual cases. Further, there is nothing in the affidavits filed by the respondents which establishes such a *prima facie* case, and they were not so founded on at the hearing before the board. The respondents' case was founded on the statements and answers by the Home Minister, as to which their Lordships have expressed their view above, and Mr. Porter's counter affidavit, which their Lordships will now consider.

In para. 8 of his affidavit Mr. Porter states that on 1st October 1942, the Home Minister directed that on receipt of the report of arrest under R. 129, Defence of India Rules, together with a recommendation by the Police for detention under R. 26 in respect of persons arrested in connexion with the disturbances or suspected of being so connected, orders of detention under R. 26 (1) (b) should at once

7. (39) 26 A. I. R. 1939 Cal. 529 : I. L. R. (1939) 2 Cal. 411 : 183 I. C. 349 (S.B.), *Emperor v. Hemendra Prosad Ghoshe*.

be issued as a matter of course subject to review by Government on receipt of further details to be supplied in each case by the Intelligence Branch. That clearly meant the substitution of the recommendation by the police in place of the satisfaction of the Governor prescribed by R. 26, and equally rendered any order under R. 26 in conformity with the Home Minister's direction, to which their Lordships have already referred as the routine order, ab initio void and invalid as not being in conformity with the requirements of R. 26. Their Lordships now turn to the cases before them, to which the routine order applied, and they quote the statement of Mr. Porter with regard to the first of these two cases, that of respondent 1:

"10. Sibnath Banerji : He was arrested by the Police under R. 129, Defence of India Rules, on 20th October 1942. On 27th October 1942, I considered the materials before me and in accordance with the general order of Government directed the issue of an order of detention under R. 26 (1) (b), Defence of India Rules. On receipt of fuller materials the case was later submitted for consideration of the Honourable Home Minister, Bengal, from whom no order directing withdrawal or modification of the order of detention was received."

Their Lordships are unable to read Mr. Porter's statement that he had considered the materials before him as involving anything more than that he had considered the report of the arrest and the recommendation of the police to see if there was material sufficient to justify the issue of an order under the routine order. It cannot mean that, in spite of the direction of the Home Minister in the routine order, he considered the materials before him so as to satisfy himself, independently of the police recommendation, that an order under R. 26 should be issued. That would not be in accordance with the requirement of the routine order that — the police having recommended it — the order of detention should be issued as a matter of course. Further, the inaction of the Home Minister on the later submission of the fuller materials to him could not cure the invalidity of the order of 27th October 1942. The case of Nani-gopal Majumdar, respondent 5, is stated in para. 11 of Mr. Porter's affidavit, and is substantially the same as that of respondent 1. The order in his case was issued by Mr. Porter on 8th March 1943, and no further materials had been received at the date of the affidavit, 24th May 1943. Their Lordships agree with the unanimous conclusion of the Federal Court that the orders of detention in the cases of the present respondents 1 and 5 are invalid.

There remain the cases of respondents 3, 6, 7 and 8. The orders of detention in these cases were earlier in date than the routine order of

1st October 1942, and are not affected thereby. As their Lordships have already stated, there is no evidence in these cases sufficient to rebut the presumption as to their regularity. There is only one point on which their Lordships desire to add an observation. In paras. 2, 3 and 4 of his affidavit Mr. Porter states that in the cases of Debabrata Roy, present respondent 3, Pratul Chandra Ganguly, present respondent 8, and Birendra Ganguly, present respondent 7, he himself considered the materials supplied and, in fact, the orders of detention were signed by him. In the case of Niharendu Dutt Majumdar, present respondent 6, Mr. Porter, in para. 6 of his affidavit, does not say by whom the case was considered. The order of detention is signed by S. B. Bapat, Deputy Secretary to the Government of Bengal. This is a case typical of the application of the presumption, and, if the respondents had wished to probe the matter, in case the consideration might have been by some one not qualified as an officer subordinate to the Governor within the terms of S. 49 of the Act of 1935, they should not have let the matter rest there, but proceeded either by counter affidavit or by cross-examination of Mr. Porter on his affidavit. As they did not take such a course, the presumption remains undisturbed.

Accordingly, their Lordships agree with the Chief Justice of the Federal Court that the orders of detention in the cases of respondents 3, 6, 7 and 8 were valid, and the appeal of the Crown will be allowed in the case of these four respondents. Counsel for the Crown stated to their Lordships that, without prejudice to any further action under R. 26 that the Crown may find it expedient or necessary to take, it was not intended that any further action should be taken against these four respondents under the particular orders which are before the board in this appeal. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed as respects respondents 3, 6, 7 and 8, and the judgments and orders of the Courts below should be set aside, and that it should be declared that the order of detention under R. 26, Defence of India Rules, in each of these cases was a valid and proper order; that in the case of respondents 1 and 5 the appeal should be dismissed and the judgments and orders of the Courts below should be affirmed. There will be no order as to costs.

R.K.

Order accordingly.

Solicitors for the Crown—*Solicitor, India Office.*

Solicitors for Respondents —

Stanley Johnson & Allen.

A. I. R. (32) 1945 Privy Council 165*(From Madras)*

26th June 1945

LORD ROCHE, LORD GODDARD,
SIR MADHAVAN NAIR AND
SIR JOHN BEAUMONT*Secretary of State — Appellant*
v.*G. Krishna Rao — Respondent.*

Privy Council Appeal No. 41 of 1944.

(a) Civil P. C. (1908), S. 100—Question of law
—Nature of title—So also whether certain document constitutes evidence is question of law.

The question about the nature of title, involves a question of law. So also the question as to whether the draft cowle upon which both the lower Courts largely based their judgments constituted any evidence of the conditions on which the original grant was made, is a matter of law. [P 167 C 1, 2]

(b) Land tenure—Inam — Shrotriem — Grant may be of melvaram or of proprietary rights — If melvaram is granted, subsequent grant by inam commissioner does not change character of inam—Full proprietary rights held vested in grantee.

A grant of a shrotriem inam may be either of the revenue from the land only, which is termed melvaram, or it may be of the proprietary rights, that is, of the rights which the Government had in the land. If the original grant gave only the melvaram the subsequent proceedings of the inam commission and the title deed granted by them will not change its character or vest in the inamdar a subject-matter not belonging to him. Where no sanad or cowle has been produced or even shown to have been executed the title deed granted by the inam commission and the extracts from the inam register are evidence, and indeed the best evidence, of the true character of the grant. The fact that grant was confirmed for two lives only does not prove that it was of melvaram only because there is no reason why a grant of the full proprietary rights should not be made either for a period of lives or without any limitation in point of time : (21) 8 A.I.R. 1921 P. C. 1 ; (42) 29 A. I. R. 1942 P.C. 21 and (17) 4 A.I.R. 1917 P. C. 42, *Ref.*; (13) 14 I. C. 261 (Mad.), *held partially overruled* by (17) 4 A. I. R. 1917 P. C. 42. [P 167 C 2]

[As the grant included poramboke, full proprietary rights held vested in grantee.]

J. Millard Tucker and S. P. Khambatta —
for Appellant.
C. S. Rewcastle and P. V. Subba Row —
for Respondent.

Lord Goddard.—The action out of which this appeal arises was brought by the respondent in the Court of the Subordinate Judge, Coimbatore, for an injunction restraining the Government of the Province of Madras from levying water cess from the plaintiff or his ryots in respect of a jaghir consisting of seven shotriem villages in the Coimbatore taluk. The learned Subordinate Judge dismissed the action, and his judgment was affirmed by the learned District Judge of Coimbatore. His judgment was reversed by the High Court of Madras, which granted the injunction on 28th July 1942, and against that judgment this ap-

peal is brought. In this judgment, which was delivered by Somayya J., with whom Abdur Rahman J., concurred, the High Court said that the only question they had to decide was whether under the grant in question all the rights which the Government possessed (that is all the rights in the lands in question) had passed to the grantee and with this their Lordships agree. The appellant contends that all that was granted to the plaintiff's ancestor was the melvaram, or right to the revenue, from the lands, while the respondent's contention is that the grant carried not only the melvaram but also the proprietary interest in the land itself, and in the latter case there is no question but that water cess cannot be claimed by the Government.

It is not in dispute that the villages were originally granted as a shotriem inam to the respondent's great-grandfather Govinda Rao, as a reward for his services as Head Sarishtadar of the district. The grant itself could not be found, and indeed it seems that no formal cowle was ever issued. It appears that it had been the original intention of Government to grant the shotriem for three lives, but as Govinda Rao died before any cowle was issued it was confirmed for two lives in favour of Govinda's son Krishna Rao, the respondent's grandfather. The evidence begins with a letter (Ex. 1) from the Secretary of the Revenue Department to the Chief Secretary of Government dated 8th December 1825, transmitting a list of the villages selected by Govinda as a shotriem. The letter stated the aggregate survey value of the villages, not, it will be observed, the revenue derived therefrom, and concluded "the extent and value of these villages being moderate the Board beg leave to recommend that they be granted as a shrotriem on the usual conditions." The Secretary to the Government replied saying that the grant of the villages on shotriem tenure was approved and asking for the preparation and submission of the requisite deed so that it might be executed. On 22nd December 1825, the Secretary to the Board of Revenue wrote to the Principal Collector, Coimbatore, forwarding a copy of a draft of a cowle for jaghirs and asking him to prepare a cowle accordingly for the grant to Govinda Rao. Then, on 26th April 1832, the Secretary of the Board of Revenue informed the Chief Secretary that shortly before the death of Govinda Rao and at his request he had put his adopted son and next heir, Krishna Rao, in possession of the villages, and stating that the board believed that no cowle was issued to Govinda Rao but that it was to be gathered from the correspondence that the shotriem was granted for three lives or to the grantee

and his next two heirs. The next document in order of date consists of entries in the register of inam in one of the shotriem villages dated 6th February 1864. The general class to which the inam belongs is stated to be "shotriem village"; it is set out that the shotriem being granted by the British Government is to be confirmed and that the present holder is willing

to commute his present tenure into freehold by paying quit-rent. Then it is stated that the assessment of all the villages comprised in the grant including the value of the waste land is Rs. 7000 and states how the value is calculated. On 6th May 1864, a title deed was granted to Krishna Rao by the Inam Commissioner. The deed is in these terms:

Coimbatore (Seal—Inam commission—Madras.)

No. 559. Title deed granted to Krishna Rao.

1. On behalf of the Governor-in-Council of Madras, I acknowledge your title to the shrotriem village of Maileripalayam and six other villages as per 4th side — taluk of Coimbatore, district of Coimbatore claimed to be of acres 8,680.98 (eight thousand six hundred and eighty) of dry land, and acres 12.89 of wet land and (one hundred and thirty) 130.99 acres of garden land besides poramboke.

2. This inam is subject to a jodi or quit-rent of Rs. 10 per annum, and is confirmed for two lives only, but it is not otherwise transferable; and on the expiration of the limited term above-mentioned it will lapse to the State.

3. On your agreeing to pay an annual quit-rent of Rs. 1,182 (one thousand one hundred and eighty-two rupees), inclusive of the jodi already charged on the land as above stated, your inam tenure will be converted into freehold; in which case the land will be your own absolute property, to hold or dispose of as you think proper, subject only to the payment of the above-mentioned quit-rent.

4. If you should desire to commute the quit-rent for the payment of a sum of money, once for all, equal to (20) twenty years' purchase of the quit-rent, you will be at liberty to do so.

Coimbatore,

6th May, 1864.

Rs. 4,700-0-0½ (Seal : Inam Commission—Madras)

(Seal : Governor-in-Council of Madras.)

(Signed) _____,
Inam Commissioner

Whereas you have agreed to convert your tenure into a freehold, on the terms offered by you in Clause (3) three of this Deed, your Inam is hereby confirmed to you as Freehold in perpetuity, subject only to the payment of the annul quit-rent therein mentioned, viz., Rs. 1,182 (one thousand one hundred and eighty-two rupees).

Coimbatore,
6th May, 1864.

(Signed) _____,
Inam Commissioner.

(Seal : Inam Commission, Madras.)

	Dry.	Garden.	Wet.		Assessment		
					Rs.	As.	P.
Maileripalaiyam	...	2,099.98	93.24	12.89	4,700	0	0
Nachipalaiyam	...	1,141.91	3.10	...			
Karisamikaundanpalaiyam	...	960.17	5.20	...			
Palattarai	...	665.57	9.55	...			
Iambakaundanpalaiyam	...	587.85	19.88	...			
Vellimalapatnam	...	2,461.04			
Naikampalaiyam	...	7,644.6 (sic)			
Total	...	8,680.98	130.99 (sic)	12.89	4,700	0	0

Coimbatore,
6th May 1864.

(Signed) _____,
Acting Inam Commissioner.

The next document in order of date is Ex. D which is headed "Revenue Board's proceedings dated 13th October 1887." How this document came into existence is somewhat obscure, but taken together with Ex. C, which is dated 29th May 1913, the position seems to have been this. In 1887, the Government were desirous of acquiring some of the shotriem lands. There was an award by the District Judge of a sum by way of purchase price for some of the lands which was paid on 29th March 1884. With regard to 233 acres, the amount offered by the Government was refused and that land was accordingly not bought but was ordered to be kept as an enclosure within the reserve of the forest. But in 1912 the Jaghirdars themselves proposed an exchange of these 233 acres for other land in the neighbourhood and to this the Govern-

ment agreed. The document Ex. D is a copy of the Inam claims register and the importance of it is that it shows that the Jaghirdars' claim to proprietary rights over the village was admitted to the extent of 1273 acres and to 233 acres portion of 210 bullahs, though to the remainder of the 210 bullahs title was not admitted. Then when the suggestion for an exchange of these 233 acres was made the Jaghirdars expressly claimed melvaram and proprietary rights over them and Ex. C shows that on 29th May 1913, this claim was admitted and the exchange was effected, 240 acres being awarded to the claimants, as they were called, on the same tenure as the block surrendered.

These are all the documents put in evidence relating to the land in question and no oral evidence was given which threw any light on

the nature of the original grant. Before the Subordinate Judge, however, the Government Pleader produced, apparently without objection, a document stated by him to be a copy or draft of a cowle in use about the time of the original grant; and which he asserted showed the conditions on which such grants were made. If there had been evidence that this grant had been made on the conditions appearing in this document there would be no doubt that the original grant was of the right to melvaram only and no proprietary interest in the land itself was given. But no evidence was given as to this draft. Had objection been made to its being looked at, at all in their Lordships' opinion the objection ought to have prevailed. In any case it could only have been looked at for what it was worth and it appears from the judgment of the District Judge that the plaintiff did object that no such deed was ever granted to his predecessor. In fact it is clear that no deed at all was ever executed at the time of the original grant. Both the learned Subordinate and the District Judges paid great attention to this draft and indeed really founded their judgments upon it holding that it showed what were "the usual conditions" referred to in the letter of 8th December 1825. But in their Lordships' opinion the document has no evidential value whatever. Assuming as they do that it was a genuine document obtained from a Government office, there is nothing to show that the conditions set out in it were, if usual, the only conditions which were usual or used, and certainly nothing to show that they applied generally or that no other forms were used. Indeed, as will appear later in this judgment, it is now established that shotriem grants sometimes carried only rights of melvaram and sometimes proprietary rights so that there must have been other forms and their Lordships agree with the High Court that this draft affords no evidence as to the terms on which the original grant was made and no conclusion or inference can be founded on or drawn from it.

Before turning to the main question in the case, it will be convenient to dispose of one matter raised by the appellant, namely, whether the appeal to the High Court was competent. It was argued that the whole question was one of fact and that as there had been concurrent findings by both the lower Courts a second appeal was incompetent by reason of the provisions of Ss 100 and 101, Civil P. C. No submission to this effect was made in the High Court and in their Lordships' opinion there is no substance in the objection. What has to be decided is the nature of the respondent's title, which in

their opinion involves a question of law. There is also the question as to whether the draft cowle upon which, as already observed, both the lower Courts largely based their judgments constituted any evidence of the conditions on which the original grant was made, and that again is a matter of law. Their Lordships have no doubt that the High Court had jurisdiction to entertain the appeal.

Turning now to the main questions, which are what was the nature of the original grant and what did it include, there are two matters which have been established by decision of this Board, which must be borne in mind. The first is that a grant of a shotriem inam may be either of the revenue from the land only, which is termed melvaram, or it may be of the proprietary rights, that is of the rights which the Government had in the land. The second is that if the original grant gave only the melvaram the subsequent proceedings of the inam commission and the title deed granted by them will not change its character or vest in the inamdar a subject-matter not belonging to him (48 I. A. 56¹ at page 67 and *Secretary of State v. Vidhya Sri Varada Thirta Swamigal*, hereinafter referred to as the *Swamigal case*, 69 I. A. 22² at p. 40)

In the present case as no sanad or cowle has been produced or even shown to have been executed the title deed granted by the inam commission and the extracts from the inam register referred to above are evidence, and indeed the best evidence of the true character of the grant. In the judgment of this Board, delivered by Sir George Rankin, in the *Swamigal case*² it was said that the Madras Act, 8 of 1869, created no presumption that the view of the inam commission was unfounded and unquestionably in many cases the inam right does comprise the proprietary rights in the soil. In that case the Board held that the title deed granted by the commission and the entries in the register were evidence of the true intent and effect of the original grant and of the right which in 1864 was being recognized and continued. It was contended by the appellant in the present case that, as in this case the grant was expressly confirmed for two lives only, the two cases are essentially different, there being no limitation for lives in the former. In their Lordships' opinion this makes no difference, as they can see no reason why a grant of the full proprietary rights should not be made either for a period of lives or without any limitation

1. (21) 8 A. I. R. 1921 P. C. 1 : 44 Mad. 421 : 48 I. A. 56 : 60 I. C. 230 (P. C.), *Secretary of State v. Srinivasa Chariar*.

2. (42) 29 A. I. R. 1942 P. C. 21 : I. L. R. (1942) Kar. P. C. 49 : I. L. R. (1942) Mad. 893 : 69 I. A. 22 : 200 I. C. 1 (P. C.).

in point of time. As the inam deed shows, if granted for lives, the grantee is given the option of acquiring an unlimited interest in the subject of the grant and that was done in this case. The proceedings in 1883 and 1884 and as recently as 1913 also show that at those dates the Government recognized that the full proprietary rights were vested in the grantee, and this case is stronger in favour of the grantee than was the *Swamigal case*² not only on this ground but also because here the inam deed included poramboke in the grant. Since the decision of this Board in what is usually called the *Urlam case*, 44 I. A. 166,³ there can no longer be any question but that a grant of the proprietary interest includes the grantor's rights in tank, river, and channel poramboke, and it is unnecessary to consider what effect, if any, such a grant has on what is called communal poramboke such as burning grounds, threshing floors and the like. In their Lordships' opinion the judgment of the Madras High Court in 24 M. L. J. 36,⁴ where a contrary opinion was expressed must be regarded as overruled to that extent by the *Urlam case*.³ In the present case the High Court said:

"There is not the slightest indication that any rights were reserved by Government except the right to collect Rs. 1,182 every year. Further the expression 'besides poramboke' was put in to indicate that not merely the lands that were then cultivated as dry, wet, or garden were granted but also all the other rights which the grantor had as is pointed out by the Judicial Committee in the *Swamigal case*.²"

With this their Lordships agree as they do with the rest of the High Court's judgment. There remain two further matters which should be mentioned. An argument was addressed to the Board which was not raised before the High Court based on the provisos to S. 1 of Madras Act, 7 of 1865. By the first proviso a zamindar, inamdar, or any other description of land holder not holding under ryotwari settlement is by virtue of engagements with the Government entitled to irrigation free of separate charge and no cess shall be imposed for water supplied to the extent of this right and no more. It was submitted that this proviso did not apply because the lands were held under ryotwari settlement. If they were it would have been open to the Government to prove it, but no evidence whatever was given on this point and no more need be said upon it. The other matter is that their Lordships desire to emphasise, as did the High Court in their judgment, that this case is not concerned with the rights of

persons other than the grantor and grantee, and the respective rights and liabilities between the inamdar and the ryots are in no way affected by this judgment. Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

R K.

*Appeal dismissed.*Solicitors for Appellant — *Solicitor, India office.*Solicitors for Respondent — *Douglas Grant & Dold.***A. I. R. (32) 1945 Privy Council 168***(From Bangalore)*

18th June 1945

LORD GODDARD, SIR MADHAVAN NAIR
AND SIR JOHN BEAUMONT
Subbiah Reddy and another
Appellants

v.

T. Jardon — Respondent.

Privy Council Appeal No. 52 of 1943.

(a) Civil P. C. (1908), S. 100 — Accident due to defendant's negligence is finding of fact.

A finding that the accident was caused by the negligence of defendant, is one primarily of fact.

[P 169 C 1]

(b) Tort — Vicarious liability — Servant held acted within scope of his authority.

The car in which the accident occurred belonged to S and was used in connexion with his business; it was being driven by his son G who was employed in the business; the car was being demonstrated to one about to join the business, that is, for the purposes of the business:

Held that G was acting within the scope, or apparent scope, of his authority as a servant of S and S was answerable for G's tort. [P 169 C 1]

(c) Tort — Damages — Amount of — Finding by trial Judge — In India appellate Court can reverse finding.

In British India the full rigour of the rule stated in (1935) 1 K.B. 354 that the appellate Court should not be inclined to reverse the finding of the trial Judge as to amount of damages does not apply.

[P 169 C 2]

(d) Tort — Damages — Quantum of, depends on loss suffered.

Damages for tort are based on the loss suffered by the plaintiff, and the consideration that the decree of the Appeal Court was against an additional defendant who might be in a better position to pay than the defendant originally held solely liable is irrelevant.

[P 170 C 1]

Phineas Quass and W. H. Hammerton —
for Appellants.

Respondent Ex parte.

Sir John Beaumont—This is an appeal from the judgment and decree of the Additional Judge of the Court of the Honourable the British Resident in Mysore, Bangalore, dated 14th August 1940, varying a judgment and decree of the District Judge, Bangalore, dated 20th November 1939. The claim of the

3. (17) 4 A. I. R. 1917 P. C. 42 : 40 Mad. 886 : 44 I. A. 166 : 41 I. C. 98 (P. C.), Bala Surya Prasada Roy v. Secretary of State.

4. (13) 14 I. C. 261 : 24 M. L. J. 36, Narayanasawamy Naidu v. Secretary of State.

plaintiff was for damages for injuries sustained by him in an accident to a motor car in which he was a passenger. He sued J. G. Anniah Reddy, defendant 1 and appellant 2 who was the driver of the car, and his father, J. Subbiah Reddy, defendant 2 and original appellant 1, who was the owner of the car. Subbiah died on 20th December 1940, and appellants (i) to (xvi) are his legal representatives.

The material facts are that in September 1937, the plaintiff, who was a motor engineer and salesman, was negotiating for a position in International Motors, Bangalore, a concern owned by defendant 2, in which defendant 1 was employed. In the morning of 27th September, whilst the draft of a proposed agreement between plaintiff and the firm was being typed, defendant 1 took the plaintiff out in a Skoda car in order to demonstrate the performance of the car. In the course of the drive, there was an accident due to the failure of defendant 1, who was driving, to notice an obstruction across the road in time to avoid it. The car overturned, and the plaintiff's left arm was severely injured, and eventually had to be amputated below the elbow. Both the lower Courts held that the accident was caused by the negligence of defendant 1, and in their Lordships' view this finding, which is one primarily of fact, is clearly right, and must be accepted. The trial Judge passed a decree against defendant 1 for Rs. 12,500 damages, but dismissed the suit against defendant 2. In appeal the Additional Judge increased the damages to Rs. 25,000 and reversed the decree dismissing the suit against defendant 2. In the result he passed a decree against both defendants for Rs. 25,000 and costs.

Their Lordships feel no doubt that the Additional Judge was right in holding defendant 2 liable. The car in which the accident occurred belonged to him, and was used in connexion with his business; it was being driven by his son, who was employed in the business; and the car was being demonstrated to one about to join the business, that is for the purposes of the business. It is clear therefore that defendant 1 was acting within the scope, or apparent scope, of his authority as a servant of defendant 2, and the latter is answerable for his tort. The only question which requires consideration on this appeal is that of damages, and this raises a question of some importance. The respondent had not appeared, but Mr. Quass for the appellants has argued that the Additional Judge had no right to interfere with the amount of damages found by the lower Court. He relies upon the rule acted upon by the Court of Appeal in England which was

stated recently by Greer L. J., in (1935) 1 K. B. 354,¹ in these terms:

"This Court will be disinclined to reverse the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

This rule originated at a time when the assessment of damages was the province of the jury, and illustrates the reluctance which an appellate Court always feels in interfering with the decision of a trial Court upon a question of fact, especially when the decision is that of a jury. In British India civil suits are not tried with a jury, and trial Judges generally have less experience in assessing damages for tort than have Judges in England, where such claims are very common. An Appeal Court should never interfere arbitrarily and without good reason with the decision of the lower Court, and upon questions of fact the advantage which the trial Judge enjoys in having seen the witnesses, and sometimes in knowledge of local conditions, must always be recognised; but where such considerations do not operate, an Appeal Court is entitled, and indeed bound, to give effect to its own view on matters within its competence. To hold otherwise would be to deprive parties of the benefit of a right of appeal which they possess. Their Lordships see no sufficient reason for holding that in British India the full rigour of the rule stated in (1935) 1 K.B. 354¹ applies. They think therefore that the Additional Judge was entitled to act upon his own view as to the amount of damages, and they proceed to consider how far his award was justified by the evidence.

The plaintiff claimed Rs. 60,000 as damages. The trial Judge (as already mentioned) assessed the damages at Rs. 12,500. He based this figure upon the general claim for disfigurement, loss of health, pain and suffering, and expenses of treatment, and on the handicap which the plaintiff would suffer in his earning capacity by the loss of an arm. The learned Judge, however, stated that the reduction of the plaintiff's income had not been shown, nor could it be said, to be due wholly, or even largely to the injury he had received. Therein the learned Judge was not correct. The evidence of the plaintiff was that down to the month of the accident he had been employed by Mysore Motors at a salary of Rs. 200 a

1. (1935) 1 K. B. 354 : 104 L. J. K. B. 199 : 152 L. T. 231, *Flint v. Lovell*.

month and a commission which brought his total earnings up to Rs. 350 to Rs. 400 a month. The manager of Mysore Motors put the commission at Rs. 125 to Rs. 150 a month. The plaintiff further gave evidence that owing to the loss of his arm he was unable to obtain a licence to drive a car, and that his earnings at the time of the trial were Rs. 80 salary and commission, bringing his total earnings up to Rs. 130 a month. His employer put the latter figure at Rs. 140. There is therefore satisfactory evidence that the earnings of the plaintiff had been reduced by about Rs. 200 a month since the accident, and it is a legitimate inference that the reduction was the result of the accident, since it is obvious that loss of an arm and consequent inability to drive a car must be a serious handicap to a motor salesman. In appeal the Additional Judge doubled the damages, but gave no detailed reasons for so doing. Damages for tort are based on the loss suffered by the plaintiff, and the consideration that the decree of the Appeal Court was against an additional defendant who might be in a better position to pay than the defendant originally held solely liable is irrelevant. Their Lordships think that the Additional Judge was not justified on the materials before him in awarding so large a sum as Rs. 25,000, but on the other hand that the trial Judge did not give sufficient weight to the evidence of actual loss of earning capacity by the plaintiff. In their Lordships' view Rs. 15,000 is a fair sum at which to assess the damages. Their Lordships will therefore humbly advise His Majesty that the decree of the Additional Judge be varied by reducing the sum decreed from Rs. 25,000 to Rs. 15,000. In other respect the decree will stand, and there will be no order as to the costs of this appeal.

R.K.

Decree varied.

Solicitors for Appellants—*Douglas Grant & Dold.*
Respondent *Ex parte.*

A. I. R. (32) 1945 Privy Council 170*(From Peshawar)*

30th July 1945

LORD SIMONDS, SIR MADHAVAN NAIR
AND SIR JOHN BEAUMONT

Sir Mohd. Akbar Khan — Appellant
v.

S. Attar Singh (deceased) and others
— *Respondents.*

Privy Council Appeals Nos. 16 and 22 of 1943.

(a) N.-W. F. P. Courts Regulation (1 of 1931), S. 34 — Order rejecting objections to award and refusing to amend it — No revision lies if Court has considered them but if Court has failed to consider revision lies.

If the Judge has considered the point whether a particular omission by the arbitrators was obvious, and has come to the conclusion that there was no obvious error which he could correct his decision would be final. On that hypothesis he has exercised jurisdiction even if in so doing he has reached a wrong conclusion, and revision would not lie. But if, on the other hand, he has declined to consider the submission because he was of opinion that he had no power in any event to amend the award of the arbitrator, then he has failed to exercise a jurisdiction vested in him and the High Court would be justified in interfering in revision. [P 172 C 2]

(b) Arbitration — Scope of reference — Costs, question as to.

In an appeal from a preliminary decree for dissolution of partnership and accounts, the Court directed that the costs should follow the result. The case was then referred to arbitration. The arbitrators passed an award by which it was directed that each party should bear their own costs. The question for consideration was whether the question of costs was within the jurisdiction of the arbitrators:

Held that the direction by the appellate Court that the costs should follow the result necessarily involved that when the whole case was referred to arbitration the arbitrator should have power to deal with the costs and the arbitrator was acting within his authority in directing that each party should pay his own costs. [P 172 C 1]

(c) Interest — Appropriation of payment for interest or principal—Mode of.

Although a debtor may appropriate a payment to a particular debt he cannot appropriate a payment to principal before the interest is paid. [P 173 C 1]

W. Wallach — for Appellant.

Parikh and S. P. Khambatta—for Respondents.

Sir John Beaumont. — These are three consolidated appeals from the Court of the Judicial Commissioner, North-West Frontier Province. Appeal No. 22 covers an appeal and cross appeal from a decree of the said Court dated 10th July 1939 which varied a decree passed by the Senior Subordinate Judge, Mardan, dated 28th November 1938. Appeal No. 16 is from a decree of the Court of the said Judicial Commissioner, dated 3rd July 1941 which varied an order dated 13th September 1940 passed by the Senior Subordinate Judge, Mardan, in execution proceedings. Most of the controversy arises on Appeal No. 22 and it will be convenient to deal with that appeal first. On 1st January 1919 the appellant, Sir Mohammad Akbar Khan (hereinafter called "the appellant"), and the original respondent 1 S. Attar Singh (hereinafter called "respondent 1"), entered into a deed of partnership for carrying on the business of money-lending. The appellant was to finance the business, and respondent 1 was to manage it. Under cl. (8), Hira Singh, the father of respondent 1, was to be liable as a surety for loss occasioned by the default of respondent 1. On 25th July 1929 the appellant instituted the suit out of which these appeals arise, for dissolution of the partnership and the taking of the necessary accounts. The defendants were

respondent 1, his father Hira Singh, and respondent 1's sons. The plaint alleged that all the defendants constituted a Hindu joint family, and that respondent 1 had entered into the partnership with the plaintiff on behalf of such joint family. Hira Singh died before the hearing of the suit and two of his sons, the respondents—Ishar Singh and Wazir Singh—were brought on the record as his legal representatives with respondent 1. It may be mentioned that respondent 1 died in January 1941 and respondents 2, 3 and 4 are his legal representatives.

The suit came on for hearing on 6th October 1930 before the Senior Subordinate Judge, Mardan, who by his judgment, dismissed the suit against all the defendants except respondent 1, and on 15th October 1930 a preliminary decree was passed declaring the partnership to have been dissolved as from 13th July 1929 and directing various partnership accounts. The appellant appealed from the said decree to the Court of the Judicial Commissioner, North-West Frontier Province, and on 1st August 1931 the Court gave judgment upholding the dismissal of the suit as against the sons of respondent 1 but holding that Ishar Singh and Wazir Singh, as legal representatives of Hira Singh, with respondent 1 were properly sued and should be restored to the record as defendants. In passing such order the Court noted that before the final decree it would be necessary for the Court to determine the extent, if any, to which Hira Singh's estate was liable under cl. 8 of the partnership deed, and whether the liability was such as could properly fall upon his legal representatives whoever they might be. The Court further directed that the costs in the lower Court should follow the result.

On 3rd May 1933 the Senior Subordinate Judge, on the application of the parties, directed that the decision of the whole case should be referred to the Hon'ble R. B. Lala Ram Saran Das as arbitrator. On 14th January 1938 the arbitrator made his report. After discussing very fully the contentions of the parties raised before him the arbitrator held that the contribution to the partnership capital of the appellant was Rs. 290,882-11-3, which sum, together with interest at annas 7 per cent. per month (the rate agreed in the partnership deed) up to 31st July 1929 came to Rupees 4,85,415-0-3 and that out of that sum the appellant had already withdrawn Rs. 93,843-12-0 on 11th July 1929 so that the balance due to him was Rs. 3,41,672-3-0. After adding various sums which the arbitrator held that the appellant was entitled to, the arbitrator found the total sum due to the appellant as Rupees 4,50,920-15-0 for which sum he purported to

pass a decree in favour of the appellant against respondent 1. The arbitrator stated that he exonerated the legal representatives of the deceased surety Hira Singh, because of the fact that no liability in terms of the partnership deed had been incurred by the said surety. The arbitrator, as regards the costs of the suit, directed that the parties should bear their own costs because the issues involved were very complicated and both the parties had partly succeeded in respect of their allegations and pleadings.

Against that award both the appellant and respondent 1 filed objections. Respondent 1 challenged the whole award and alleged misconduct on the part of the arbitrator. The appellant asked that the award might be remitted to the arbitrator so that he might take the objections of the appellant into consideration and make the necessary amendments in his award. The powers of the Court to amend an award are contained in cl. (12) of Sch. 2, Civil P. C. So far as relevant to this appeal, an award can be amended when it appears that part of an award is upon a matter not referred to arbitration and that part can be separated from the other part; and where the award contains an obvious error which can be amended without affecting the decision. Clause (14) deals with the power of the Court to remit an award; but, as the claim to remission was abandoned by the appellant, this need not be considered.

The objections were heard by the then Senior Subordinate Judge, Mardan, who, on 28th November 1938 accepted the award and passed a final decree in favour of the appellant for Rs. 4 50,920-15-0, and directed that he should get future interest on the principal sum of Rs. 1,97,038 15-3 at the agreed rate of 7 annas per cent. per mensem against respondent 1 from the date of the suit to realization, and directed that the parties should bear their own costs. In giving his reasons for dismissing the objections of respondent 1 the learned Judge pointed out correctly that the decision of the arbitrator was final on questions both of law and of fact, and that he, the learned Judge, was not sitting in appeal upon the decision of the arbitrator. In dismissing the objections of the appellant the learned Judge said that he was of the opinion that legally he was not competent to rectify the award because he could not add anything to, or subtract anything from it. He noted that the claim for remission of the award had been given up.

Under cl. (16) of Sch. 2 to the Civil P. C. no appeal lay from the order of the learned Subordinate Judge, but under the North-West Frontier Province Courts Regulation, 1931,

S. 34, power is conferred upon the Court of the Judicial Commissioner to call for the record in any case in which no appeal lies, and, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction with material irregularity, to make such order in the case as it thinks fit. Under this Regulation the appellant applied in revision to the Court of the said Judicial Commissioner and the application was heard by Soofi J. who delivered judgment on 10th July 1939.

The learned Judge held that the appellant was entitled to have the award rectified in respect of four matters. First he held that it was not competent for the arbitrator to exonerate altogether from liability the representatives of Hira Singh, since the fact of Hira Singh's liability had already been determined by the Court of the Judicial Commissioner by the order directing that such representatives should be restored to the record, and be awarded a substantial sum against the estate of Hira Singh, though less than the appellant claimed. Their Lordships think that the learned Judicial Commissioner was clearly wrong upon this point. The order of the Judicial Commissioner's Court of 1st August 1931, merely held that the representatives of Hira Singh were properly before the Court as defendants in order that the liability, if any, of Hira Singh as surety might be determined; but the question whether any such liability existed was a matter to be determined in the suit before a final decree was passed, and this matter was included in the reference of the whole suit to arbitration. In their Lordships' opinion the arbitrator, in deciding that Hira Singh's representatives were under no liability exercised a jurisdiction vested in him and his award on this point cannot be challenged.

The second point decided was that the direction of the Court of the Judicial Commissioner that costs in the lower Court should follow the result removed the question of costs from the jurisdiction of the arbitrator, and that the appellant was entitled to his costs in the lower Court. Their Lordships are of opinion that the learned Judge was wrong also on this point. The direction that the costs should follow the result necessarily involved that when the whole case was referred to arbitration the arbitrator should have power to deal with the costs, and the arbitrator was acting within the scope of his authority in directing that each party should pay his own costs.

The fourth point decided was that the arbitrator should have allowed to the appellant a

sum of Rs. 1,26,000 being the amount which respondent 1 had allowed to a debtor to the partnership in settling the amount of such debtor's claim. The arbitrator held that this remission fell within the scope of respondent 1's authority as managing partner. This was clearly a matter which the arbitrator had power to decide and the learned Subordinate Judge was right in holding that he could not interfere with the award on this point, whether he agreed with it or not, and his judgment is not open to revision.

The third point decided by Soofi J. presents rather more difficulty. The arbitrator in the course of his award held that respondent 1 had made deductions in respect of first payments of interest on making various loans on behalf of the partnership, and that he ought to have given credit for these amounts. But, in determining at the end of his award the total sum due to the appellant the arbitrator omitted any mention of these sums. Mr. Wallach for the appellant agrees that the sum involved is Rs. 75,971, and not the sum of Rs. 76,567 mentioned in the judgment of Soofi J. Their Lordships think that it was open to the appellant to argue that the omission from the final calculation of this sum, when the arbitrator had found that it ought to be allowed, was an obvious error which could be amended without affecting the arbitrator's decision, under cl. (12) of Sch. 2, and their Lordships must assume that such a submission was made to the learned Subordinate Judge. If the learned Subordinate Judge considered the submission, and came to the conclusion that there was no obvious error which he could correct his decision would be final. On that hypothesis he exercised jurisdiction even if in so doing he reached a wrong conclusion, and revision would not lie. But if, on the other hand, he declined to consider the submission because he was of opinion that he had no power in any event to amend the award of the arbitrator, then their Lordships think that he failed to exercise a jurisdiction vested in him. Which attitude the learned Judge did adopt is not altogether clear from his judgment. His statement that he was not competent to rectify the award because he could not add anything to, or subtract anything from, it, rather suggests that he thought he had no jurisdiction to amend the award in any manner, though the language is not altogether conclusive. But their Lordships observe from the judgment of Soofi J. that counsel had submitted that the arbitrator had by sheer oversight not given the appellant the credit of this amount, and that counsel for the respondents did not challenge the correctness of this submission. Their Lordships think, there-

fore, that they must take it that the learned Subordinate Judge did, in this respect, fail to exercise a jurisdiction vested in him, and that there must be allowed to the appellant on account of interest a sum of Rs. 37,985 being half the total sum of Rs. 75,971. In the result the learned Judicial Commissioner passed a decree dated 10th July 1939, by which the liability of respondent 1 under the award was increased to the sum of Rs. 5,52,204-7-0 and the appellant was given his costs in that Court and the lower Court.

The decision of the Board on these four points disposes of the cross appeal No. 22. The decision on points 1 and 4 also disposes of appeal No. 22 in which the appellant claimed an increase in the amounts awarded by the Judicial Commissioner under these heads.

Appeal No. 16 raises the question "What amount of principal remains due to the appellant on which interest runs?" On 17th March 1939, a sum of Rs. 291,951-11-0 was received by the appellant. His contention was that that sum should be treated as a payment in the first instance of the interest due, and that only the balance after satisfying the interest should be treated as a payment of capital. In execution proceedings the learned Subordinate Judge held that the sum received should be attributed, in the first instance, to capital. On an appeal presented under S. 47, Civil P. C., against the order of the Subordinate Judge the Court of the Judicial Commissioner, North-West Frontier Province, disagreed with this view. The judgment dealt with the matter in the following terms:

Point 5.—"Although it is undoubtedly correct that a debtor may appropriate a payment to a particular debt, we know of no authority for the proposition that he can appropriate a payment to principal before the interest is paid. This view is supported by A. I. R. 1922 Pat. 369¹ and A. I. R. 1922 P. C. 233² relied upon by learned counsel for the decree-holder. He concedes that after payment of interest, payments should be appropriated to the interest-bearing portion of the decree before being appropriated to the non-interest bearing portion. The calculation of the interest due up to 17th March 1939, made by the executing Judge has not been disputed. The payment made on that date therefore discharged all the interest due up to that date and all the interest-bearing principal (Rs. 1,97,038-15-3) except Rs. 4739-12-0. This latter sum alone will therefore carry interest from that date and any subsequent payments will be credited in the first place to the payment of interest on that sum, in the second place to the payment of that sum and in the third place to the satisfaction of the remainder of the decree."

The law so stated appears to their Lordships to be right, and it has not been chal-

lenged by either party. But the appellant contends that in applying the law the learned Judicial Commissioner fell into error, and that the interest bearing principal should have been the sum of Rs. 1,49,272-1-8 and not Rs. 4739-12-0 as found by the Judicial Commissioner. The figures as worked out in the appellant's case show that on 31st July 1929, there were due to the appellant a sum of Rs. 1,97,038-15-3 as principal and Rs. 1,44,532-5-0 as interest. Between 31st July 1929, and 17th March 1939, a further sum of interest amounting to Rs. 99,652-8-5 accrued due, so that on that date the total amount due for interest was Rs. 2,44,184-13-5. On the said 17th March 1939, the appellant received a sum of Rs. 2,91,951-11-0. According to the principle laid down by the Court of the Judicial Commissioner this amount should have been debited against the interest due so far as the same would extend and this would leave a balance of Rs. 47,766-13-7 to be deducted from principal leaving the amount of principal due as Rs. 1,49,272-1-8, not the sum of Rs. 4739-12-0. In finding this latter sum the Court of the Judicial Commissioner seems to have added the interest received between 31st July 1929, and 17th March 1939, to the principal sum due on 31st July 1929, omitting the very substantial sum of interest due on that date and to have deducted the sum of Rs. 2,91,951-11-0 from that total; this seems to have been an obvious error. The figures showing the amount of capital due as Rupees 1,49,272-1-8 were before the Court of the Judicial Commissioner when leave was granted to appeal to His Majesty in Council, and were the basis on which such leave was given. The figures have not been challenged by the respondent, though Mr. Parikh says that he is not in a position to admit them. In order to bring the figures up to date it will be necessary to add to the interest due to the appellant the sum of Rs. 37,985 allowed in appeal No. 22, thereby increasing the amount of principal bearing interest by a like amount. The appellant therefore succeeds in appeal No. 16.

With regard to the costs of the appeal to His Majesty in Council the appellant has succeeded in the whole of appeal No. 16 but he has failed on three out of four claims made in appeal No. 22 and in the cross-appeal and the heavier part of the record is concerned with that appeal. In the circumstances their Lordships think that the fairest order is to direct each party to pay his own costs. Their Lordships will therefore humbly advise His Majesty that in appeal No. 22 the order of the Court of the Judicial Commissioner of the North-West Frontier Province dated 10th July 1939, be set aside and that the order of the Senior Subordinate Judge of Mardan, dated

1. ('22) 9 A. I. R. 1922 Pat. 369 : 67 I. C. 606, Mukhtar Ahmed v. Mt. Bibi Rahimunnissa Begum.
2. ('22) 9 A. I. R. 1922 P. C. 233 : 44 Mad. 570 : 48 I. A. 150 : 61 I. C. 31 (P. C.), Venkatadri Appa Rao v. Parthasarthy Appa Rao.

28th November 1938, be restored but with the variation that the amount due to the appellant be increased from Rs. 4,50,920-15-0 to Rupees 4,88,905-15-0 and that the appellant should pay three-quarters of the costs of the respondents in the application to the Court of the Judicial Commissioner; and that in appeal No. 16 the order of the Judicial Commissioner's Court dated 3rd July 1941, be varied by declaring that the interest bearing principal remaining due to the appellant on 17th March 1939, was Rs. 1,87,257-1-8 instead of Rs. 4739-12-0. There will be no order as to the costs of these appeals.

R.K. *Order accordingly.*
Solicitors for Appellant — *Stanley, Johnson & Allen.*
Solicitors for Respondents — *T. L. Wilson & Co.*

A. I. R. (32) 1945 Privy Council 174
(*From Oudh*)

1st March 1945

LORDS THANKERTON, SIMONDS AND
GODDARD, SIR MADHAVAN NAIR
AND SIR JOHN BEAUMONT.

Judah — Appellant

v.

Isolyne Shrojbashini Bose and another

Privy Council Appeal No. 26 of 1944; Oudh Appeals Nos. 2 and 3 of 1941.

(a) Evidence — Evidence of interested party called as expert — Value of.

There cannot be any more unsatisfactory evidence than that of an interested party called as an expert.
[P 175 C 1]

(b) Will — Testator being unwell does not necessarily mean that he had no testamentary capacity.

The fact that the testator was unwell when he executed the will is a long way from saying that he had no testamentary capacity.
[P 175 C 2]

(c) Evidence Act (1872), S. 155—Letter written by witness is no evidence of facts stated therein—Letter can be used to discredit witness.

A letter written by a witness is no evidence of the facts therein stated, and the only legitimate use to which the letter can be put would be to use it in cross-examination for the purpose of discrediting the witness if what he had written was inconsistent with his evidence.
[P 175 C 2]

(d) Evidence Act (1872), S. 88 — Telegram — Facts in — Proof of.

The contents of a telegram are not evidence of the facts stated in it.
[P 175 C 2]

W. Wallach — for Appellant.

C. S. Newcastle & K. Diplock — for Respondents.

Lord Goddard. — The proceedings out of which this consolidated appeal arises concern the testamentary dispositions of Mrs. Manmohini Mitter, a widow formerly living at Lucknow. She died on 7th April 1934, leaving three daughters her surviving, the appellant who was the youngest, respondent 1 who was the second daughter and respondent 2 the eldest. When their mother died each daughter produced a will which she claimed was the last

true will of the deceased. Each daughter petitioned the Court of the Civil Judge at Lucknow for letters of administration with the respective wills produced by them annexed, and the three petitions were consolidated and tried as one suit. The will propounded by the appellant is dated 12th April 1930; that propounded by respondent 1 is dated 8th September 1930 and the third will is dated 4th November 1933. During the hearing of the case the two respondents came to terms; they each admitted the validity of the will propounded by the other. They agreed that letters of administration should be granted to respondent 2 with the will propounded by her annexed, but that if the Court refused to admit that will then the will propounded by respondent 1 was to be admitted and in either event they were to share the estate in the proportion of one-third to respondent 1 and two-thirds to respondent 2. But that did not dispose of the will propounded by the appellant, as to which both respondents denied its due execution. In addition respondent 1 alleged that at the date of execution the testatrix was not of sound disposing mind, though respondent 2 did not challenge her capacity.

In support of her case the appellant called the three attesting witnesses on the will of 12th April 1930. She herself did not give evidence, and this was made the subject of comment by the Chief Court. It is not clear to their Lordships what relevant evidence she could have given, either as to the execution of the will or as to her mother's state of health on the material day, as there was no suggestion that she was at the house or even in Lucknow about the time, either before or after, that the will was executed. Of the three witnesses to the will one was a professor at the Lucknow Christian College, another a medical man who had been some 20 years in practise and was on the staff of a Medical College at Lucknow and the third a clerk in the employment of a business house. The will was actually written out for the deceased by the professor who subscribed as the first witness. It is to be observed that all three witnesses had been sent for by the deceased herself and were entirely disinterested. They were all in agreement as to the due execution of the will and that the testatrix was clear in her mind and knew what she was doing. She herself dictated the will to the Revd. Mr. Sicar. That she was unwell at the time is admitted. She told the doctor that she had had a vomiting fit that day, and also that in the previous year she had an attack of paralysis and the vomiting caused her to fear another attack, which would be a very good reason for her wanting to make a will. The

doctor however was quite satisfied that she was fully conscious and aware of what she was doing. These witnesses were really not challenged in cross-examination, nor was any evidence called to contradict them, except that at a late stage respondent 2 was allowed to give evidence in rebuttal. She was called apparently because she holds some sort of medical degree to testify to the effect of an attack of apoplexy on the mental condition of the person attacked. Her evidence was entirely worthless and indeed inadmissible. It was based entirely on hearsay; she had not seen her mother at or about the material time nor was there any evidence that the deceased ever had an apoplectic seizure, nor can their Lordships think of any more unsatisfactory evidence than that of an interested party called as an expert. In a careful and full judgment the Judge of the civil Court accepted the evidence of the three attesting witnesses whom he had seen, and it is indeed difficult to see how he could have done otherwise considering that, as already stated, it was uncontradicted. He therefore pronounced for the will propounded by the appellant. With regard to the wills propounded by the respondents, either of which if valid would of course have the effect of revoking the earlier one, he held that they were not duly executed and in addition that the will propounded by respondent 2 was obtained by coercion and was not the will of the testatrix. Accordingly he granted letters of administration with the will of 12th April 1930, annexed to the appellant.

The respondents then appealed to the Chief Court of Oudh. That Court affirmed the judgment of the Civil Judge so far as he found against the two later wills, but allowed the appeal against his finding in favour of the will propounded by the appellant. It is against this latter finding that this appeal is brought. The respondents have not appealed. The learned Judges of the Chief Court found themselves unable to believe the evidence of the three attesting witnesses as to the state of mind of the testatrix. Their only reasons for this were the contents of a letter written by the appellant's daughter and of two telegrams both signed "Grace" which they assumed were sent by a Mrs. Grace Paul, a professional nurse, though there was no evidence whatever that she had sent them and in the witness box she denied all knowledge of them. Dealing first with the letter which was written to the appellant, it is undated and the girl in her evidence said she wrote it not in 1930 but in 1929. Both Courts however thought from internal evidence in the letter that she was mistaken about this and that the letter was in

fact written in April 1930, and within quite a short time of the execution of the will, and their Lordships assume that this finding is correct. The girl was staying with her grandmother and evidently resented having to nurse her and do all the housework in addition. She wanted to be relieved of this and go home, so very naturally drew a somewhat gloomy picture of the conditions with which she had to cope, but was careful to say that the patient was not so ill that she could not leave her. The letter is no evidence of the facts therein stated. The girl herself gave evidence and the only legitimate use to which the letter could be put would be to use it in cross examination for the purpose of discrediting her if what she had written was inconsistent with her evidence. But in any case there is in their Lordships' opinion nothing in the letter which shows or suggests that the testatrix was incapable of making a will in April, 1930, nor, if there was, could the opinion of a girl of 17 be accepted against the evidence of a doctor who was quite disinterested and who was supported by two equally disinterested and respectable witnesses. With regard to the two telegrams it would be enough to say that their Lordships do not understand how they came to be admitted as evidence. They were not produced by the addressee but by respondent 2 who gave no evidence as to how she came by them. It was never proved who the sender was, and Mrs. Paul who it was suggested had despatched them denied she had done so. Then again the contents of the telegrams are not evidence of the facts stated in them, nor is there anything in them to show that the testatrix was incapable of making a will. It was all along a common ground that she was unwell when she executed the will but that is a long way from saying that she had no testamentary capacity. Their Lordships are unable to find that the Chief Court had any sufficient ground for differing from the conclusion of the learned Civil Judge who saw and believed the attesting witnesses, and with whose judgment their Lordships think it right to say they entirely agree. The result is that the appeal should be allowed; the decrees of the Chief Court should be set aside and the decree of the Civil Judge restored. Under that decree the appellant gets her costs in the civil Court, and the respondents must pay the costs of the appeals to the Chief Court and of this appeal. They will humbly advise His Majesty accordingly.

G.N.

*Appeal allowed.*Solicitors for Appellant — *T. L. Wilson & Co.*

Solicitors for Respondents —

Ford, Michelmores, Rose and Wilkins.

** A. I. R. (32) 1945 Privy Council 176

(*From Madras : ('43) 30 A. I. R. 1943**Mad. 398*)

30th July 1945

LORD PORTER, LORD GODDARD AND
SIR JOHN BEAUMONT*V. E. A. Annamalai Chettiar —*
Appellant

v.

Valliammai Achi and another —
Respondents.

Privy Council Appeal No. 19 of 1944.

*(a) Limitation Act (1908), Art. 182 (5)—Execution petition dismissed—Appeal by decree-holder—Case comes within both branches of Art. 182 (5)—Limitation should be computed from date of final order of appellate Court : I.L.R. (1943) Mad. 485 : ('43) 30 A. I. R. 1943 Mad. 398 : 210 I.C. 79, *REVERSED*; 47 Bom. 783 : ('23) 10 A. I. R. 1923 Bom. 431 : 73 I. C. 1030, *OVERRULED*.

On 3rd November 1934, the creditor obtained a decree on a pronote and on 14th December 1934 presented a petition under O. 21, R. 11, Civil P. C., asking that the decree should be executed by attachment of certain sums of money in the hands of garnishees alleged to be owing to the judgment-debtor and on 11th February 1935 the Court ordered attachment as prayed for. On 25th July 1935, the judgment-debtor applied under S. 47, Civil P. C., praying that the attachment of the monies in the hands of the garnishees be raised. On 22nd October 1936, the Court allowed the application and raised the attachment. On 3rd December 1936 the judgment-creditor appealed to the High Court asking that the order of the lower Court be set aside and on 27 September 1938, this appeal was dismissed by the High Court. The question was whether a subsequent execution application filed by the judgment-creditor on 25th November 1939, was in time :

Held (1) that the execution petition dated 14th December 1934, was an application made according to law for execution of the decree and it was finally disposed of by the High Court on appeal

on 27th September 1938, which brought the case within the first branch of Art. 182 (5);

[P 178 C 1]

(2) the appeal to the High Court to set aside the order of the lower Court raising the attachment was an application according to law to take a step in aid of execution of the decree. It was also an application to the proper Court for when an application for execution was dismissed by the lower Court the appeal Court was the proper and indeed the only Court which could then execute the decree;

[P 178 C 1, 2]

(3) the case thus came within both branches of Art. 182 (5), and the application of 25th November 1939, having been filed within three years of the final order of the High Court dated 27th September 1938, was in time : I.L.R. (1943) Mad. 485 : ('43) 30 A.I.R. 1943 Mad. 398 : 210 I.C. 79, *REVERSED*; 47 Bom. 783 : ('23) 10 A. I. R. 1923 Bom. 431 : 73 I. C. 1030, *OVERRULED*.

[P 178 C 1, 2]

Limitation Act —

('42) Chitaley, Art. 182, N. 105, Pts. 1 and 2.

('38) Rustomji, Page 1828, Pt. 5; Page 1829 Pt.1.

(b) Limitation Act (1908), Art. 182 (5) — Whether step in aid of execution can be only in pending execution and in furtherance of it (*Quære*).

Whether there cannot be a step in aid of execution if there is no application for execution pending and whether a step in aid of execution must be one in furtherance of execution and not merely one seeking to remove an obstruction to possible future execution.

[P 178 C 1]

*J. P. Eddy and J. M. Parikh — for Appellant.**P. V. Subba Row — for Respondents.*

Sir John Beaumont.— This is an appeal from an order of the High Court of Judicature at Madras, dated 19th August 1942, affirming an order of the Subordinate Judge of Devakottai, dated 10th July 1940. The appeal raises the question whether an application for execution, No. 72 of 1940, preferred on 25th November 1939, for execution of a decree dated 3rd November 1934, is barred by the Limitation Act, and that depends on the construction of Art. 182 of the Act. That article is in the following terms :

Description of Application.	Period of Limitation.	Time from which period begins to run.
182. For the execution of a decree or order of any civil Court not provided for by Art. 183 or by S. 48, Civil P. C., 1908.	Three years.	<ol style="list-style-type: none"> 1. The date of the decree or order, or 2. (where there has been an appeal) the date of the final decree or order of the appellate Court, or the withdrawal of the appeal, or 3. (where there has been a review of judgment) the date of the decision passed on the review, 4. 5. (where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take some step in aid of execution of the decree or order, or

The application is clearly barred by para. 1 of Art. 182 unless it can be brought within one of the later paragraphs. Paragraph 2 has no application since there was no appeal against, or affecting the validity of, the

decree; nor does para. 3 apply since there was no application for review of judgment. Paragraph 4 is irrelevant so far as this case is concerned.

The question therefore is whether the case

falls within para. 5. To bring the case within that paragraph it must be shown that there was an application made in accordance with law to the proper Court, either for execution or to take some step in aid of execution of the decree, and if there was such an application time runs from the date of the final order passed thereon. It is necessary, therefore, to look somewhat closely at the facts, which are not in dispute, in order to see whether the requisite application was made and finally disposed of within three years from 25th November 1939.

On 3rd November 1934, a decree was passed on a promissory note in Original Suit No. 118 of 1934 by the Subordinate Judge of Devakottai, decreeing in favour of the present appellant payment of a sum of Rs. 13,716-12-0, with interest and costs by the defendants who were two widows. It was ordered that the decree should be against the property of the joint family of which the husbands of the two widows had been members, and against the assets of a maker of the promissory note in the hands of the defendant. So the decree was not executable against the private property of the widows. For the purposes of this appeal it may be taken that the respondents represent the judgment-debtors under that decree, the appellant being the judgment-creditor.

On 14th December 1934, the judgment-creditor presented a petition which was numbered E. P. No. 418 of 1934, under R. 11 of O. 21, Civil P. C., asking that the decree should be executed by the attachment of two sums of money in the hands of garnishees, alleged to be owing to defendant 1.

On 21st January 1935, the learned Judge made an order on this petition "rule absolute," which presumably meant that there was an order absolute for attachment of the monies in the hands of the garnishees.

On 11th February 1935, the judgment-creditor made an application, No. 123 of 1935 in E. P. No. 418 of 1934, asking that he might be appointed receiver to realise the amounts in the hands of the garnishees.

On 19th February 1935, an application No. 175 of 1935 was made in E. P. No. 418 of 1934 by defendant 2 in the suit, asking that the order of attachment of the amounts in the hands of the garnishees might be set aside, her contentions being, in short, that she had not been served with the application for attachment and that the monies attached were her personal property and therefore not subject to the decree.

On 10th July 1935, the learned Subordinate Judge on this application directed that there was no need to set aside the order of attachment but that the petitioner should prefer a

claim petition which might be enquired into under S. 47, Civil P. C., and the matter was adjourned to 25th July. On the same date, namely, 10th July 1935, the learned Judge dismissed the judgment-creditor's application, No. 123 of 1935, for his appointment as receiver, directing that he could make an application after defendant 2's claim was disposed of.

On 25th July 1935, defendant 2 made an application, No. 527 of 1935, in E. P. No. 418 of 1934, under S. 47 of the Code, praying that the attachment of the monies in the hands of the garnishees be raised, and on 2nd August 1935, in view of the pendency of the last mentioned application, application No. 175 of 1935 for the raising of the attachment was dismissed. On 22nd October 1936, the learned Subordinate Judge allowed defendant 2's application and raised the attachment and it is to be noticed that that order was made in E. A. No. 527 of 1935, in E. P. No. 418 of 1934, and in O. S. No. 118 of 1934. On the making of this order the execution of the decree was open; the judgment-creditor could either accept the order and seek to execute his decree by some method other than that asked for in E. P. No. 418 of 1934, or he could appeal against the order of the Subordinate Judge. He elected to adopt the latter course and on 3rd December 1936, he presented a memorandum of appeal to the High Court at Madras in E. A. No. 527 of 1935 in E. P. No. 418 of 1934 and in O. S. No. 118 of 1934, asking that the order of the lower Court be set aside, and on 27th September 1938 this appeal was dismissed by the High Court.

On 25th November 1939, as already mentioned, the judgment-creditor filed Execution Petition No. 72 of 1940, in O. S. No. 118 of 1934, asking that the decree of 3rd November 1934 might be executed by attachment of certain moveable property in the hands of defendants 2 and 3. The question for determination is whether this petition is in time.

The High Court of Madras in the judgment under appeal took the view that from 10th July 1935 there was no execution petition or application outstanding and that the Petition No. 72 of 1940, being presented more than three years after that date, was out of time. Their Lordships are unable to appreciate this view which ignores the fact that on 10th July 1935 an application by one of the judgment-debtors to set aside the "attachment" was pending on the records of the Court and the further fact that on 27th September 1938 this application was finally disposed of by an order made by the High Court of Madras in E. P. No. 418 of 1934, which could not have been done had that petition terminated in July 1935.

Subject to the question whether the High Court of Madras was the proper Court within Art. 182 (5), their Lordships are clearly of opinion that the appellant brings his case within both branches of that paragraph. Execution Petition No. 418 of 1934 was an application made according to law for execution of the decree, and it was finally disposed of by the order of the Court of appeal made on 27th September 1938, which brings the case within the first branch. Further, the application to the Court of appeal of 3rd December 1936, to set aside the order of the Subordinate Court raising the attachment was an application according to law to take a step in aid of execution of the decree. There has been some difference of opinion in the Courts in India as to what amounts to taking a step in aid of execution and the judgment under appeal discusses various decisions, including a decision of the High Court of Madras in 45 Mad. 466,¹ in which it was held that there could not be a step in aid of execution if there was not an application for execution then pending and another decision of the same Court in 50 Mad. 49,² in which it was held that a step in aid of execution must be one in furtherance of execution and not merely one seeking to remove an obstruction to possible future execution. Their Lordships do not find it necessary to express any opinion on these questions since in the present case there was at all material times an application for execution pending, and upon any view of the matter an application to set aside an attachment is a step, in the circumstances the only step open, in aid of execution.

The only other point to be considered, and this was the point principally stressed on this appeal, is whether the High Court of Madras was the proper Court within Art. 182 (5). Explanation 2 to Art. 182 enacts that the proper Court means the Court whose duty it is to execute the decree or order. In 47 Bom. 783,³ an Appeal Bench of the Bombay High Court held that an appeal to the High Court against an order in execution was not an application according to law to the proper Court, and Macleod C. J. stated :

"It certainly cannot be said that an appeal to the High Court against an order in a dharkast is an application in accordance with law to the proper Court for execution. The High Court is not a Court whose duty it is to execute decrees passed by the lower Courts."

1. ('22) 9 A. I. R. 1922 Mad. 79 : 45 Mad. 466 : 70 I. C. 324, Kuppaswami Chettiar v. Rajagopala Aiyar.

2. ('26) 13 A. I. R. 1926 Mad. 1178 : 50 Mad. 49 : 98 I.C. 156, Krishna Pattar v. Seetharama Pattar.

3. ('23) 10 A. I. R. 1923 Bom. 431 : 47 Bom. 783 : 73 I. C. 1030, Govinddas Rajaramdas v. Ganpatdas Narotandas.

This view was accepted by the High Court in the judgment under appeal, but their Lordships think that it is fallacious. Under S. 107, Civil P. C., an appeal Court has the same powers, and is required to perform, as nearly as may be, the same duties as are conferred and imposed by the Code on Courts of original jurisdiction. Where an application for execution is dismissed by the lower Court, the appeal Court is the proper and indeed the only Court which can then execute the decree. No doubt in practice a High Court does not itself generally execute the decrees of lower Courts; normally it remands the case to the lower Court with directions to execute according to law on the basis of the High Court's decision; but in a proper case the High Court would no doubt execute the decree or order itself. In their Lordships' view there can be no doubt that the High Court of Madras was the Court whose duty it was to execute the decree of 3rd November 1934 in the manner asked for in E. P. No. 418 of 1934, if such manner were legal, after the attachment had been raised by the lower Court. The appellant therefore has brought himself within para. 5 of Art. 182 and his Petition No. 72 of 1940 being presented within three years of the order of the High Court finally disposing of the Execution Petition No. 418 of 1934 is in time. Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed and that the matter should be remitted to the High Court of Madras with directions that the Execution Petition No. 72 is within time and should be dealt with according to law. The respondents must pay the costs to date of Execution Petition No. 72 of 1940 including the costs of this appeal.

G.N.

Appeal allowed.

Solicitors for Appellant — *Lambert & White.*

Solicitors for Respondents —

Hy. S. L. Polak & Co.

A. I. R. (32) 1945 Privy Council 178 (From Madras)

30th July 1945

LORD PORTER, LORD GODDARD, SIR
MADHAVAN NAIR AND SIR JOHN
BEAUMONT

*Sri Raja Bommadevara Naganna
Naidu Bahadur Zamindar Garu —
Appellant*

V.

*Sri Raja Bommadevara Venkatrayulu
Naidu Bahadur Zamindar Garu and
another — Respondents.*

Privy Council Appeal No. 8 of 1942.

(a) Civil P. C. (1908), O. 21, R. 90 — Requirements to be proved for setting aside sale under, indicated—Nature of proof.

In order to set aside a sale under O. 21, R. 90, it should be proved that there was material irregularity or fraud in publishing or conducting the sale, and that the applicant had sustained substantial injury by reason of such irregularity or fraud. Mere irregularity or fraud in publishing or conducting the sale will not entitle the Court to set it aside, unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. Upon the language of the proviso to O. 21, R. 90, as it now stands, what is required is that the Court should be satisfied that the applicant has suffered substantial injury by reason of material irregularity or fraud, and if the Court is so satisfied from the facts proved then the applicant may be said to have discharged his burden. This burden may be discharged not only by direct evidence connecting the material irregularity or fraud with the substantial injury, but also by circumstantial evidence, that is evidence from which a reasonable inference may be drawn that the substantial injury was the result of the material irregularity or fraud : ('35) 22 A. I. R. 1935 Mad. 459 and ('33) 20 A. I. R. 1933 All. 747, *Approved*; 21 Cal. 66 (P.C.), *Ref.* [P 179 C 2; P 180 C 1]

C. P. C. —

('44) Chitaley, O. 21, R. 90, N. 2 Pt. 18; N. 40, Pts. 1, 10.

('41) Mulla, Page 891, Note "Substantial injury;" Page 893, Pts. (q), (r), (u).

(b) Civil P. C. (1908), O. 21, Rr. 90 and 66 — Estate paying revenue—No separate revenue fixed on portion of estate sold — Omission to mention revenue in sale proclamation is not material irregularity.

No doubt omission to state in the sale proclamation the revenue on an estate or part of an estate paying revenue to the Government, as required by O. 21, R. 66 (2) (b), where it is possible to state the amount accurately or even approximately, is a material irregularity within the meaning of O. 21, R. 90. But where the property sold is a portion of the estate upon which no separate revenue has been fixed, the omission to state in the sale proclamation the revenue payable on the portion of the estate sold does not amount to material irregularity, within the meaning of O. 21, R. 90. [P 180 C 2; P 181 C 1]

C. P. C. —

('44) Chitaley, O. 21, R. 90, N. 18; O. 21, R. 66, N. 10.

('41) Mulla, Page 886, Pt. (k).

(c) Civil P. C. (1908), O. 21, Rr. 54, 67 and 90 — Collector's office and District Judge's Court situate in same compound—Copy of sale proclamation affixed in District Judge's Court — Sale widely advertised — Omission to affix copy of sale proclamation in Collector's office is not material irregularity.

Ordinarily, the omission to affix the sale proclamation in the Collector's office as prescribed in O. 21, R. 54 read with R. 67 would indeed be a material irregularity as it is a non-compliance with the procedure prescribed by law, but where the Collector's office and the District Judge's Court are situated in the same compound and a copy of the proclamation was duly affixed in the District Judge's Court and the sale is widely advertised in various daily papers, the omission to affix a copy of the sale proclamation in the collector's office can hardly be called material irregularity, the object of the rule requiring affixture of the sale proclamation in the Collector's office being to give sufficient publicity to the sale. [P 181 C 1]

C. P. C. —

('44) Chitaley, O. 21, R. 90, N. 15; O. 21 R. 54, N. 10; O. 21, R. 67, N. 4.

('41) Mulla page 887 pt. (t).

S. P. Khambatta—for Appellant.

C. S. Rewcastle and P. V. Subba Row —

for Respondents.

Sir Madhavan Nair. — This appeal arises out of an application by the appellant who is a judgment-debtor to set aside a court sale of six items of property belonging to him which were sold in execution of the decree in Original Suit No. 38 of 1919 in the Court of the Subordinate Judge of Ellore, obtained against him by respondent 1, the decree holder. This appeal relates only to three items of the properties; these being items 4, 5 and 6, specified in the sale proclamation. At the sale the properties were purchased by the decree-holder himself. The application to set aside the sale was made under O. 21, R. 90, Civil P. C., which empowers the Court to set aside a sale "on the ground of material irregularity or fraud in publishing or conducting it." This power of the Court is subject to the proviso "that no such sale be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the appellant has sustained substantial injury by reason of such irregularity or fraud."

The subordinate Judge of Ellore to whom the application had been made, set aside the sale on the grounds that the sale proclamation did not mention the revenue assessed on the properties as required by O. 21, R. 66 (2) (b), and that the sale proclamation was not published in the Collector's office as required by O. 21, R. 54, read with R. 67, Civil P. C.; and that as a result of these irregularities the appellant had suffered substantial injury in that the sale prices were unreasonably low. The High Court of Madras reversed this decision by its order dated 23rd January 1940, holding that in the circumstances of the case the omission to mention the Government revenue was not a material irregularity; and that the failure to affix the sale proclamation in the Collector's office, though it was an irregularity, caused no substantial injury to the appellant. This appeal has been brought against the above decision of the High Court. Besides the irregularities referred to, the appellant had alleged also fraud in his petition, but both the Courts in India have found that no fraud had been committed.

The question for determination in this appeal is whether or not the appellant is entitled to set aside the court sale by reason of the above mentioned irregularities.

In order to set aside a sale under O. 21, R. 90, it should be proved (1) that there was material irregularity or fraud in publishing or conducting the sale, and (2) that the applicant had sustained substantial injury by reason of such irregularity or fraud. Mere

irregularity or fraud in publishing or conducting the sale will not entitle the Court to set it aside, unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. The words in the proviso "unless upon the facts proved, the Court is satisfied" have been substituted in the present Code for the words "unless the applicant proves to the satisfaction of the Court" in the proviso to s. 311 of the Code of 1882. In the course of the arguments the question was raised in connexion with the High Court's observation "Nor is there any evidence to connect this irregularity (failure to affix the notice in the Collector's office) with any defect in price," as to whether the substantial injury sustained by the applicant by reason of the material irregularity or fraud complained of could be proved only by "direct evidence" as stated in the judgment of the Board in 20 I. A. 176¹ or if it could be proved also by evidence from which it might be reasonably inferred that the substantial injury was the result of the material irregularity or fraud. It appears to their Lordships that upon the language of the proviso as it now stands, what is required is that the Court should be satisfied that the applicant has suffered substantial injury by reason of material irregularity or fraud, and if the Court is so satisfied from the facts proved then the applicant may be said to have discharged his burden. Their Lordships think that this burden may be discharged not only by direct evidence connecting the material irregularity or fraud with the substantial injury, but also by circumstantial evidence, that is evidence from which a reasonable inference may be drawn that the substantial injury was the result of the material irregularity or fraud, as pointed out in A. I. R. 1935 Mad. 459² where all the relevant decisions have been considered. The Madras and Calcutta High Courts have always been of this opinion. Sir Dinshaw Mullah says in his commentary on the rule that the amendment of the language of the proviso was made to give effect to the Madras and Calcutta decisions. The High Court of Allahabad which followed the rigid construction has now adopted the new rule: *see* 55 ALL. 182.³

Turning now to the essential facts of the case, the appellant is the proprietor of the North West Vallur estate consisting of about 34 villages in Kistna and West Godavari districts paying an annual peshkash (revenue) of

1. ('94) 21 Cal 66 : 20 I. A. 176 : 6 Sar. 324 (P.C.), Tassaduck Rasul Khan v. Ahmad Husain.

2. ('35) 22 A. I. R. 1935 Mad. 459 : 157 I. C. 251, Ramasesha Iyer v. Ramanujachariar.

3. ('33) 20 A. I. R. 1933 All. 747 : 55 All. 182 : 147 I. C. 844, Rajendra Behari Lal v. Gulzari Lal.

Rs. 42,000. Respondent 1 is his brother. In the partition of the main estate between himself and his brother, the appellant got 20 villages as his share and he has since purchased 14 villages in the two districts for which he had borrowed considerable sums of money. As he had failed to discharge those debts his creditors brought suits against him and obtained decrees. In enforcement of the decree obtained by respondent 1 in the partition suit (Original Suit No. 38 of 1919) for about Rs. 46,000 he brought the properties in dispute for sale and, as mentioned before, purchased them himself. The first irregularity alleged is the failure to mention in the sale proclamation the revenue assessed on the properties as required by O. 21, R. 66 (2) (b). This rule lays down that the proclamation for sale shall specify

"as fairly and accurately as possible" "the revenue assessed upon the estate or part of the estate where the property to be sold is an interest in an estate or part of an estate paying revenue to the Government."

The allegation that the revenue due on each of the properties has not been specified is not denied by respondent 1 his case being that in those cases where the proclamations do not specify the revenue payable it was impossible in the circumstances of the case to specify the revenue as the revenue due on the properties had not been separately fixed. The learned Judges of the High Court state in their judgment:

"So far as we can ascertain in all these sales wherever the proclamations do not specify the revenue payable, the property to be sold consists of either a village or part of a village with reference to which no one can say with any certainty what would have been the proportionate peshkash payable if and when the procedure laid down for the separate registry of those portions is carried out."

It is not disputed that no steps had been taken to effect separate registration of the properties and their separate assessment by resorting to the procedure prescribed by law. The learned Judges point out that even in the case of whole villages put up for sale (as in the connected C. M. A. 378 before them) where a rough approximation of the revenue might possibly have been made they found three different estimates of the proportionate peshkash in the evidence varying to a very considerable extent. It would seem that the appellant himself who stated that the peshkash for a group of villages in another connected C. M. A. was a certain amount was unable to say how much was due on each village. Their Lordships have no doubt that omission to state the revenue on an estate or part of an estate paying revenue to the Government, where it is possible to state the amount accurately or even approximately, is a material irregularity within the meaning of

the rule, but in their view the rule can have no application to a case like the present in which the property sold is a portion of an estate upon which no separate revenue has been fixed. They agree with the High Court in holding that in the circumstances of the present case the failure of the decree-holder to state the revenue payable on the lands cannot be treated as a material irregularity. The question whether it has been proved that the appellant has sustained any substantial injury by reason of the irregularity does not therefore arise for consideration.

The next irregularity alleged is the omission to affix the sale proclamation in the Collector's office as prescribed in O. 21, R. 54 read with R. 67, Civil P. C. Ordinarily, the omission to affix the proclamation in the Collector's office would indeed be a material irregularity as it is a non-compliance with the procedure prescribed by law, but in the circumstances of the present case the breach of the rule can hardly be called a material irregularity. It is stated in the judgment of the High Court that the Collector's office and the District Judge's Court are situated in the same compound and it is not denied that a copy of the proclamation was duly affixed in the District Judge's Court. Further, evidence shows that the sale was widely advertised in various daily papers. The object of the rule requiring affixture of the sale proclamation in the Collector's office is to give sufficient publicity to the sale, where such publicity has been given to the sale as in the present case the irregularity complained of can hardly amount to a material irregularity. Assuming however that the omission amounts to a material irregularity, it has not been proved by evidence direct or circumstantial that the inadequate price which the properties fetched at the sale as found by the Subordinate Judge, was by reason of this irregularity. Their Lordships have been taken through the material portions of the evidence bearing on the point but are not satisfied that the defect in price could be attributed to this irregularity. For the above reasons their Lordships would humbly advise His Majesty that the appeal fails and should be dismissed with the costs of respondent 1.

G.N.

Solicitors for Appellant — *Lambert & White.*Solicitors for Respondents — *Hy. S. L. Polak & Co.**Appeal dismissed.***A. I. R. (32) 1945 Privy Council 181***(From Jamaica)*

6th June 1945

LORD PORTER, LORD GODDARD, SIR
MADHAVAN NAIR AND SIR JOHN
BEAUMONT*Harold White — Appellant*

v.

The King.

Privy Council Appeal No. 80 of 1944.

Criminal trial—Murder case—Confession how far reliable should be scrutinised.

Confessions are not always true, and that they must be checked, more particularly in a murder case, in the light of the whole of the evidence on the record in order to see if they carry conviction. It would be dangerous in the extreme to act on a confession put into the mouth of the accused by a witness, having a motive for implicating some one, and uncorroborated from any other source.

[P 184 C 1]

*Frank Gahan — for Appellant.**S. A. Kyffin — for the King.*

Sir John Beaumont.—This is an appeal by special leave from the judgment of the Court of Appeal at Jamaica, dated 6th January 1944, dismissing the appellant's appeal on his conviction before Watts J. and a jury at Sav-la-Mar on the Northern Circuit for the Parish of Westmoreland, Jamaica, on 26th November 1943, for the murder of Lamton Woolcock on 2nd September 1943.

The appellant was arraigned on indictment before Watts J. with the murder, on 2nd September 1943, of Lamton Woolcock in the Parish of Westmoreland. He pleaded "Not Guilty" and a jury of 12 men was sworn to try the case. The trial proceeded from 22nd to 26th November 1943, when the appellant was found guilty and convicted and sentenced to death. He appealed to the Court of Appeal in Jamaica, and on 6th January 1944, his appeal was dismissed without any reasons being given by the Court. At the conclusion of the argument, before this Board their Lordships announced that they would humbly advise His Majesty that the appeal should be allowed and the conviction quashed, and that they would state their reasons in writing at a later date. This they proceed to do.

According to the evidence of the widow of the murdered man, he left his house, in accordance with his usual custom, at about 3.30 p. m. on 2nd September to go to a piece of land called "Confusion" on which he grew cocoanuts and kept cattle, and which was rather less than half-a-mile from his house. The deceased usually returned to his home at about 5 P.M. and when he did not come on the day in question his wife went to look for him, and at about 5.45 P.M. she found his

dead body lying on "Confusion." From the wounds on the body, which included 7 incised wounds, it is obvious that the man had been brutally murdered. This evidence has been accepted by both parties and makes it clear that the murder must have been committed at some time between 3.45 P.M. and 5.45 P.M. on 2nd September.

There were found close to the body 2 machettes or cutlasses, one of which (Ex. 1) was stained with human blood and was identified as having belonged to the deceased. The other (Ex. 4) was identified by a witness—Distin—who will be referred to more particularly later, as belonging to the accused. There were also found, on the next day, close to where the body lay, the husks of 26 cocoanuts of a kind similar to those grown by the deceased.

The principal witness for the Crown was one, Clifton Williams, aged about 21, apprenticed to a tailor at Sheffield, who stated that he saw the accused at about 7 P.M. on 1st September, when the accused asked him to sell 25 cocoanuts for him. For certain reasons the accused said he would not carry the cocoanuts to Sheffield Square where Williams worked, but would carry them to the Springvale crossroads, and the two men arranged to meet there about the same time the following evening. Williams said that on the next day, about 1 P.M., he saw the accused on a track leading from Springvale to Sheffield not very far from "Confusion," and that he was running with a machette in his hand. Later that evening, that is, on the day of the murder, Williams said that he went to the place where the accused and he were to meet at about 7 P.M. and found the accused in a cemetery behind a tree. The accused told him he had brought the cocoanuts which proved to number 26 husked nuts. Williams put the cocoanuts into a basket, took them to Sheffield and sold them to Mrs. Alice Campbell for a sum of 3s. He returned with the money and handed it over to the accused who gave him 6d. and said to him, "I got in a trouble to fart, for I kill somebody." On being asked by the witness, "Who you kill man?" the accused said "Then you nuh hear?" to which the witness replied, "Oh, Lammie" meaning the deceased, of whose death he had heard earlier that evening. The witness then said that the appellant said that he was going to have the last time with Winnie, and made a threat as to what he would do if he heard anybody say anything or ask about it.

It is necessary to notice the evidence of some other important witnesses. Amos Smith, a Police Constable, who was on duty in Sheffield Square on 2nd September said that

around 5 minutes past 3 P.M. he saw the accused at Sheffield Square wearing khaki pants and a khaki shirt. The accused left the Square and about half an hour later came back wearing white trousers and a print shirt. The accused and a witness—Winifred Barrett—have explained why the accused changed his clothes. Smith then continues: "I left him about half-past four, pretty near 5 o'clock and went home." This evidence seems to suggest that the witness had seen the accused in the Square from 3.30 until the witness left at near 5 o'clock and, if that evidence is true, it is clear that the accused could not have committed the murder. In his summing up the learned Judge told the jury that Smith said he saw the accused at half-past 3 and last saw him from 4.30 to 5 P.M., leaving the jury to infer that during the vital period from half-past 3 to 5 P.M. the accused was not seen by the witness. Their Lordships think that this is not the effect of the evidence which does not suggest that the accused left the Square after 3.30 and whilst the witness was present. The learned Judge failed to point out to the jury that Smith as a police constable was a man whose duties would require him to appreciate the importance of noting times correctly and that as a witness for the prosecution his evidence could not be lightly disregarded, nor did he allude to the difficulties in the way of holding that the accused could have left the Square and committed the murder between 3.30 and 5 P.M. Sheffield Square is about half-an-hour's walk from 'Confusion,' and it would have been necessary for the accused to get to 'Confusion,' to murder the deceased, collect and husk 26 cocoanuts, take them to and conceal them in, the cemetery where he is said to have met Williams later (since he could not have removed the cocoanuts after the alarm as to the murder had been given and people collected on the site), wash away the blood which the murderer must almost certainly have got on to his hands and clothes, and then return to the Square without any witness having observed him performing any one of these operations. Moreover, it would be strange if the accused, a local man, minded to steal the deceased's cocoanuts, should have effected his purpose at a time when the deceased, according to the evidence of his widow, was in the habit of being on 'Confusion.' If it be suggested that the theft may have taken place earlier in the day, then the difficulty arises that no reason is shown for the accused's return to 'Confusion' in the afternoon when the murder must have been committed.

The next witness to notice is the detective—Woolaston. He said that he found two

machettes (Exs. 1 and 4) on 'Confusion'; that he asked the accused if he had a machette; and he said he had but had loaned it to his cousin Volney White. The witness sent for the machette and recovered it from Volney White and that machette, which is Ex. 7, the accused claims to be his only machette. According to Woolaston it is more worn than Ex. 4. Woolaston also collected some clothes at the house of the accused and sent them to the pathologist, whose certificate stated that no human blood was found upon them. This fact is ignored by the learned Judge in his charge to the jury, though there were two pools of blood by the body, and it would have been very difficult for the murderer to have avoided getting some blood on his clothes.

The next witness is Distin who identified Ex. 4, as being the machette belonging to the accused. He said that the accused had often come to his tannery with this machette, which he recognised because it had a broken handle and because it was much worn, its length being reduced. The learned Judge observed that Ex. 4 had a chip on the handle. It is most unfortunate that Ex. 7 was not put to this witness. His reasons for being able to distinguish with certainty Ex. 4 as being the machette of the accused are not convincing, and he might well have hesitated if he had been asked to explain why he was certain that Ex. 7 was not the machette of the accused. In his summing up the learned Judge asked the jury whether they thought Distin had come there with the deliberate object of deceiving them. This is a plain misdirection, since it is obvious that Distin may have been an honest witness who was mistaken in his identification of the machette.

The next witness to notice is Cyril Gooden, a butcher, living at Sheffield and a friend of the accused. He said that he saw the accused on the 2nd September around 4 o'clock in the Square. This corroborates Smith's evidence as to where the accused was at that time. The witness then says that he saw the accused on 3rd September at the Chinese shop, which is presumably in the Square, at about 10 o'clock in the morning. The accused complained that he and Gooden were unpopular because they had handed over a man named Clifford Williams to the police and that, because of this unpopularity, a detective had searched his (the accused's) house though the accused said he had done nothing. After some further conversation the witness alleged that he said to the accused: "Harold, I would like to know how soon Lammie got dead" and the accused replied "Really, what happen, after I kill him I sorry for him." Later that day witness again met the accused at Zada Blackwood's

house where they seem to have sung a hymn which, it is suggested, implies that the accused was guilty of the murder. Zada Blackwood was called by the accused and she said that the accused said that they were accusing him of having killed Woolcock but that he would "like to know or see the son of a bitch that kill Lamton."

The accused gave evidence on his own behalf. He denied the whole of the evidence of Clifton Williams and the alleged conversation with Gooden.

The evidence discussed above is the most material in the case. The learned Judge in his summing up told the jury that it was a case of circumstantial evidence, and he explained to them the nature of such evidence, and at the conclusion of his charge he told them that if they found any gaps in the chain of evidence placed before them then the prosecution had failed to accomplish what it had undertaken to do, and the accused must be acquitted. But the learned Judge omitted to point out to the jury that the so-called chain consisted almost entirely of gaps. No one saw the accused going to Confusion before the discovery of the murder; no one saw him removing or husking cocoanuts on Confusion, no one saw him removing them to the place where he is said to have handed them over to Williams, and no one heard him threaten the deceased. The evidence of Williams, apart from the direct evidence of a confession is consistent with the accused having gone to 'Confusion' on the morning of 2nd September, stolen 26 cocoanuts and concealed them in the cemetery to be handed to Williams later in the day, and that it was on his return from such an expedition that Williams saw him at 1 P. M. Even if the accused's machette was found on 'Confusion,' that would not establish his presence there at the crucial time. When the evidence is analysed the case appears to rest, not on circumstantial evidence, but on the direct evidence of the confessions alleged to have been made to Clifton Williams and Gooden. Gooden's evidence as to the confession is vague and confusing. Apparently, at one and the same time the accused was complaining that he was being wrongly suspected because of local enmity, and saying that he wished to know who had committed the murder, and then that he was sorry for the man after he had killed him. The alleged confession to Clifton Williams is more detailed and is expressed in the sort of language which one might expect a man like the accused to use. But the learned Judge did not point out to the jury that Williams was in a dangerous position, since he had sold cocoanuts which appear to have been stolen from the deceased's

land on the day of the murder, and he therefore had a strong motive for implicating someone else in the murder. The jury should have been warned that it would be dangerous in the extreme to act on a confession put into the mouth of the accused by a witness so situated and uncorroborated from any other source. Their Lordships would observe further that even if the statements attributed to the accused by Williams and Gooden were in fact made, they seem to be the boastings of a vain and foolish man anxious to acquire notoriety by claiming responsibility for a murder which had excited much local interest, rather than serious confessions of guilt. Neither statement explains how, why or when the murder was committed, or mentions a single fact which would have been within the special knowledge of the murderer. The jury should have been cautioned that confessions are not always true, and that they must be checked, more particularly in a murder case, in the light of the whole of the evidence on the record in order to see if they carry conviction. The jury were given no guidance of this nature.

There is one other matter to be noticed which, indeed, Mr. Gahan in his argument on the appeal placed in the forefront of his case, and that is that questions as to his character were improperly put to the accused. Under the Jamaica Evidence Law, 1938, Chap. 468, s. 9, an accused person is a competent witness in his own defence, but sub-s. (f) provides that he shall not be asked any question tending to show that he is of bad character except in circumstances which do not arise in this case. In the course of his examination, counsel for the Crown put it to the accused that he lived by stealing. This question had no relevance to the case and was apparently made in order to suggest that the accused was a man of bad character and, therefore, likely to be guilty of the offence charged, and the question was obviously most improper. It is to be observed, however, that the question was quite general; no objection was taken to it by counsel for the accused, and the point does not seem to have been pressed. If, apart from this matter, the evidence for the Crown had been so cogent that the board felt that any jury would have been bound to convict, and that no injustice had been done by the putting of this improper question, they might have thought it unnecessary to interfere. The Court of Appeal in Jamaica, under s. 16, sub-s. (1), Court of Appeal Law, is empowered to adopt such a course. In view, however, of the weakness of the evidence in this case it is impossible to be confident that the jury were not in any way influenced by this question. However,

apart altogether from this difficulty, their Lordships are of opinion that in view of the errors and omissions in the summing up the case of the accused was never properly put to the jury and their minds were never directed to the real issues in the case. In these circumstances their Lordships are clearly of the opinion that the conviction cannot stand, and as already stated have humbly advised His Majesty that this appeal should be allowed and the conviction and sentence quashed.

R.K.

*Appeal allowed.*Solicitors for Appellant — *Gard Lyell & Co.*Solicitors for the King — *Burchells.*

A. I. R. (32) 1945 Privy Council 184
(*From Gibraltar*)

19th July 1945

LORDS ROCHE, PORTER, MERRIMAN,
GODDARD AND JUSTICE MACKINNON

In the matter of the Ship "Sidi Ifni"
Angel Saavedra Rios, Master and another
— *Appellants*

v.

His Majesty's Attorney-General and
Proctor for Gibraltar — Respondent.

Privy Council Appeal No. 59 of 1943.

(a) Prize Court — Reasonable ground for suspicion is sufficient — Claimants must prove by positive evidence that captor's suspicions are unfounded.

It is sufficient in prize law for captors seeking condemnation by the Prize Court of seized property to establish that there is reasonable ground for suspicion that the property is subject to be condemned. The claimants whose property has been seized must show to the satisfaction of the Court by affirmative evidence amounting to positive proof that the reasonable suspicion is unfounded: ('44) 31 A. I. R. 1944 P. C. 50, *Foll.*; (1918) A. C. 148, *Ref.* [P 186 C 2; P 187 C 1]

(b) Prize Court — Vessel bound for neutral port — Consignment to order — Contraband is liable to capture.

Conditional contraband should be liable to capture on board a vessel bound for a neutral port if the goods were consigned to order or if the ship's papers did not show who the consignee was: (1918) A. C. 461, *Ref.* [P 187 C 1]

(c) Prize Court — Neutral ship — Knowledge by shipowner that cargo is contraband — Positive evidence cannot be proved — It can be inferred from his omission to make enquiries.

Positive evidence of knowledge cannot be produced. It is enough even in the case of a neutral ship if the shipowner has knowledge that the cargo is contraband destined to an ultimate enemy destination. Knowledge of this destination may be inferred if the shipowner knowing facts which would cause a reasonable person to suspect the intended destination, refrains from making enquiries: (1918) A. C. 412, *Ref.* [P 187 C 2]

The Solicitor General — for Appellants.

Kenneth Diplock — for Respondent.

Lord Roche. — This is an appeal by the master and owners of the Spanish ship "Sidi

Ifni" from a judgment of the Supreme Court of Gibraltar, Admiralty Jurisdiction, sitting in Prize, dated 29th June 1943, in so far as it pronounced that ship to be liable to confiscation upon the ground that she was carrying a cargo of contraband upon a voyage from Malaga to Valencia, Spain, and condemned her as good and lawful prize. By the same judgment, the cargo laden upon the "Sidi Ifni" during this voyage, namely, 269 tons of lemons, was also pronounced to have been contraband and to have had an enemy ownership or destination and as such or otherwise subject and liable to confiscation, and was also condemned as good and lawful prize. No appeal has been entered by any claimant in respect of the cargo and, accordingly, the only question in the present appeal is as to whether upon the facts and in the circumstances the ship was rightly condemned as good and lawful prize.

The "Sidi Ifni" is a Spanish ship which was at all material times owned by the second-named appellants who are a company incorporated with limited liability under the laws of Spain. The first-named appellant is a Spanish subject and was at all material times Master of the ship. At all material times, the appellant company was specified as a person to be deemed an enemy for the purposes of the Trading with the Enemy Act, 1939, by orders made by the Board of Trade under sub-s. (2) of s. 2 of that Act. On 3rd December 1942, the "Sidi Ifni" sailed from the Port of Malaga, Spain, upon a voyage to the port of Valencia, Spain, with a cargo of 5977 cases of lemons of a net weight of 269 tons. She was not provided with a Ship Navicert valid for this or any voyage, and the cargo was not covered by any valid Cargo Navicert. On 4th December 1942, the "Sidi Ifni", while in the course of her voyage was intercepted and diverted to the port of Gibraltar and on 9th December 1942 she and her cargo were seized as Prize by the Detaining Officer, Gibraltar. Upon the same date, a Writ of Summons was issued by the respondent in the Supreme Court of Gibraltar, Admiralty Jurisdiction, in Prize, against the ship and cargo for condemnation as good and lawful prize, and was duly served. On 7th January 1943 an appearance was entered on behalf of the appellant company as owners of the ship; but no appearance was entered on behalf of any person purporting to be the owner of or otherwise interested in the cargo.

By their claim dated 18th February 1943, the appellant company claimed the release of the ship, and consequential relief, alleging as the grounds of their said claim, that the ship was under contract to carry the lemons from

the Port of Malaga to the Port of Valencia for account of the Sindicato Nacional de Frutos y Productos Hortícolas, an official body of the Spanish Government, and that at the time of the capture of the ship there were no contraband goods on board and that no enemy of Great Britain had, at the time of the capture or at any other material time, any share, right, title or interest in the said ship or the cargo therein or any part thereof. This claim came on for hearing before the Chief Justice of the Supreme Court of Gibraltar, Admiralty Jurisdiction, sitting in Prize, on 24th and 25th June 1943, when the appellant company appeared and were represented by counsel, but the owners of the cargo did not appear and were not represented.

The Ship's Roll and Deck Log which were found on board the "Sidi Ifni" at the date of her seizure and which covered a period from 4th February 1940, disclosed the following facts: (a) that upon no previous occasion had the "Sidi Ifni" carried any cargo of fruit or fruit pulp to any port of discharge in Spain; but that she had made some 30 voyages carrying such cargoes from Spanish ports to ports of discharge in southern France; namely—Sete, Port Vendres and Marseilles; (b) that from 8th March to 11th May 1941, the "Sidi Ifni" was exclusively engaged in carrying oranges from Spanish ports to Sete and returning either in ballast or with cargoes of nitrates; (c) that during the fruit shipping season of 1941-42, namely, from 27th November 1941 to 13th May 1942 the "Sidi Ifni" was exclusively engaged in carrying fruit from Spanish ports to Sete, Port Vendres and Marseilles and returning generally in ballast; (d) that upon six voyages while carrying fruit or fruit pulp from a Spanish port to a French port, the "Sidi Ifni" called at an intermediate port in Spain; the purpose of such calls, in at least three cases, was to take on bunkers; (e) that between the close of the fruit shipping season of 1940-41 and the opening of the fruit shipping season of 1941-42, with the exception of one cargo of tiles, two of maize and one general cargo, the "Sidi Ifni" was exclusively engaged in carrying either cargoes of pulp from Cartagena to Port Vendres, or cargoes of pyrites from Malaga to Valencia; (f) that after the close of the fruit shipping season of 1941-42, the "Sidi Ifni" carried three cargoes of ore (celestite) from Motril to Valencia and made one voyage to Sete in ballast, returning to Valencia with a cargo of sulphate of ammonia.

With the Ship Papers, which were on board the "Sidi Ifni" at the date of her seizure, there was also found a letter addressed by the Master to the Orange National Syndicate

dated 29th December 1941, in the following terms :

"Dear Sirs,

The undersigned, Master of the Spanish vessel 'Sidi Ifni' who has undertaken to load oranges destined for Germany via Sete for account of the Syndicate, hereby guarantees to be able to take bunkers at Barcelona for the present voyage, making himself responsible for all damages sustained by the cargo in the event of being unable to get said bunkers.

Yours truly,

(Signed) Angel Saavesra."

The bill of lading issued in respect of the cargo was stated to be issued in Malaga, was dated 3rd December 1942, was made out in the name of one A. Munoz Palomo as shipper and also named him as consignee. Freight was expressed to be payable in Malaga but no figure of the amount of the freight or the rate at which it was payable was inserted on the bill of lading. The ship's agent at Malaga and Valencia for the purposes of the voyage in the course of which the "Sidi Ifni" was seized was a company known as Baquera, Kusche and Martin Sociedad Anonima (Bakumar). This company had been suggested as agent by Munoz Palomo, and was at all material times specified by an order made by the Board of Trade under sub-s. (2) of S. 2, Trading with the Enemy Act, 1939, as a person deemed to be an enemy for the purposes of the Act. No witness was called on behalf of the appellant company to prove the ultimate destination of the cargo nor was it suggested that any inquiries had been made by that company to ascertain its destination. At the date of the voyage in question the managing director of the appellant company was one Bau who like his company was at all material times specified as a person to be deemed to be an enemy within the Trading with the Enemy Act, 1939. This gentleman was the person best in a position to speak as to the knowledge of the appellant company about the destination of the cargo but was not called as a witness. The only witness, apart from the Master, called on behalf of the appellant company was Bartolome Obrador.

Obrador was President of the company but had been absent from July 1942 to February 1943, and therefore had no knowledge of the shipment in question. Indeed until the latter date according to his own evidence he was technical director only. From his and the Master's evidence it appears that when seized in prize the vessel was under requisition to or at least on a voyage directed by a Syndicate which was a Government organisation. The previous voyages to French ports carrying fruit were said by this witness to have been undertaken whilst the ship was requisitioned by the Spanish Ministry of Industry and

Commerce. He knew, however, that Valencia was used as a port of transshipment for cargo destined for Germany since in October 1941, he objected to carrying a cargo of copper pyrites to Valencia on the ground that it was contraband. As to the cargo carried on the voyage under consideration he and the Master both said that lemons were commonly carried from Malaga to Valencia for consumption there, but as to that as well as the rest of the voyages he appeared to have taken little interest and to have made no inquiries in respect of their object or the ultimate destination of the cargoes. Indeed though he and the Master denied any knowledge of the enemy destination of the lemons, Bakumar appear to have been accepted as agents for this voyage without inquiry although they were known to be on the black list and although they were not the company's ordinary agents. Moreover, the lemons on board at the time of seizure did not constitute a full cargo and no explanation was given as to the reason for shipping a part cargo if Valencia was the ultimate destination of the consignment.

The Master on his part can hardly have been ignorant of the fact that the lemons may well have been intended for enemy use, since he had previously carried oranges from Spain to southern French ports and on certain of such voyages, of the number of which he professed himself ignorant, he had acted on the terms of the letter dated 29th December 1941, set out above which he referred to as containing "the usual Syndicate formula." Moreover the ship's papers as has been already stated disclosed the fact that on five previous voyages with fruit to French ports calls had been made at intermediate Spanish ports and of those five two at least were for the purpose of bunkering. The parties most interested in the cargo, viz., Bakumar and Munoz, were not called, nor was Bau, though its carriage must have been arranged through him. On this state of fact, the questions at issue before their Lordships and in the Supreme Court of Gibraltar were (1) Had the cargo an enemy destination and (2) Did the Owners know of it? As to (1) the law applicable is not in doubt and has most recently been stated by their Lordships' Board in (1944) A. C. 6.¹ As their Lordships point out in that case it is sufficient in prize law for captors seeking condemnation by the Prize Court of seized property to establish that there is reasonable ground for suspicion that the property is subject to be condemned. The claimants whose property has been seized must show to the satisfaction of the Court by affirmative evidence amounting to positive

1. (1944) 31 A.I.R. 1944 P.C. 50 : 1944 A. C. 6 : 215 I.C. 1 (P.C.), In the matter of S.S., "Monte Contes."

proof that the reasonable suspicion is unfounded: *see also* (1918) A. C. 148.²

The lemons, it is true, were only conditional contraband and therefore it must be shown that if they should reach enemy destination, they would assist the warlike operations of the enemy. But under the existing circumstances all foodstuffs of necessity fell into this category. Was there then reasonable ground for suspicion that the goods were likely to reach enemy territory, that is to say southern France in the present case. Their Lordships cannot doubt that there was such reasonable ground for suspicion when (a) the bill of lading was one in which the shipper and consignee were the same person and in which no rate of freight was disclosed with the result that it did not constitute the contract of carriage or disclose the terms upon which the goods were carried; (b) there was no navicert for ship or cargo; (c) the ship had been engaged in contraband traffic from Spain to French ports since June 1940; (d) no claim was made in the proceedings to the cargo of lemons and (e) Valencia has been established in at least one instance as a port of transshipment to enemy territory. Further as to (a) above their Lordships would point out that the Declaration of London as modified by the Order in Council of 29th October 1914, provided that conditional contraband should be liable to capture on board a vessel bound for a neutral port if the goods were consigned to order or if the ship's papers did not show who the consignee was: *see* (1918) A.C. 461.³

In that case it was observed at page 470 that "the reason for not waiving the doctrine of continuous voyage in the case of consignments to order can only have been that in the case of such consignments the shipper retains the control of the goods, and can alter their destination as his interest may dictate or circumstances may admit. This control may, however, be retained by the shipper, even if he consigns to a named person, provided that the consignee be bound to indorse or otherwise deal with the bill of lading as directed by the shipper."

In the present instance the shipper obviously retained control and the observations have even greater weight in a case such as this where the Declaration of London has no application. If then the evidence is sufficient to justify seizure of the cargo, is there also reasonable ground for suspicion that the owners were implicated? All the facts set out above must have been known to someone in authority and in addition the company itself, Bau its managing director at the material time and the special agents appointed for the voyage were all on the black list. It is true

that positive evidence of knowledge cannot be produced — it very seldom can — but it is enough even in the case of a neutral ship if the shipowner has knowledge that the cargo is contraband destined to an ultimate enemy destination, and knowledge of this destination may be inferred if the shipowner knowing facts which would cause a reasonable person to suspect the intended destination refrains from making inquiries: *see* (1918) A. C. 412.⁴ There remains however the question whether the owner of the ship has given proof sufficient to dissipate the suspicions rightly engendered and to entitle the ship to be released. The suspicions however are far from being wiped away in the present case. They are rather increased when it is remembered that there was no evidence oral or documentary as to the real contract of affreightment or terms of carriage and that no one was called to state the actual destination or as to the proposed disposition of this part cargo or asked what arrangements were made in respect of these matters by those authorised to act for the ship. Munoz Palomo, Bau and Baquera, Kusche and Martin were the witnesses plainly required to clear up these matters. None of them were called nor was any explanation of their absence given. These considerations were those which weighed with the Chief Justice in the Supreme Court of Gibraltar and their Lordships agree with him in considering them conclusive of the case. A further argument was addressed to their Lordships by the Crown based upon the terms of paras. 2 and 3 (i) of the Reprisals Order which are as follows:

"(2) Any vessel on her way to or from a port through which goods might reach or come from enemy territory or the enemy armed forces, not being provided with a Ship Navicert valid for the voyage on which she is engaged, shall, until the contrary is established, be deemed to be carrying contraband or goods of enemy origin or ownership, and shall be liable to seizure as prize; provided that a vessel, other than a vessel which sailed from or has called at an enemy port, shall not be liable to seizure under the provisions of this Article unless she sailed from or could have called at a port at which she would, if fully qualified, have obtained a Ship Navicert.

(3) Goods consigned to any port or place from which they might reach enemy territory or the enemy armed forces, and not covered by a valid Cargo Navicert or, in the case of goods shipped from a British or Allied port, by a Valid Export or Transshipment Licence, where such Licence is required, shall, until the contrary is established, be deemed to have an enemy destination."

As their Lordships think the ship was properly condemned apart from the terms of this Order, they do not think it necessary to pronounce upon its effect. In accordance with

2. (1918) 1918 A. C. 148; 87 L. J. P. 1: 117 L. T. 619, *The "Hakan"*.

3. (1918) 1918 A. C. 461; 87 L. J. P. 57: 118 L. T. 274, *The "Louisiana"*.

4. (1918) 1918 A. C. 412; 87 L.J.P. 94: 118 L. T. 268, *The "Hillerod"*.

the views expressed above they will humbly advise His Majesty that this appeal should be dismissed with costs.

R.K. *Appeal dismissed.*

Solicitors for Appellants — *Slaughter & May.*

Solicitors for Respondent — *Treasury Solicitor.*

A. I. R. (32) 1945 Privy Council 188

(*From Jamaica*)

17th July 1945

LORDS PORTER, MERRIMAN AND
GODDARD, SIR MADHAVAN NAIR
AND SIR JOHN BEAUMONT

Olive French Marsh — Appellant

v.

*Norman Leslie Fitz Morris Marsh —
Respondent.*

Privy Council Appeal No. 58 of 1943.

(a) Husband and wife—Divorce—Intervener's appeal pending—Husband dying — Marriage is dissolved when decree has been pronounced and widow loses status of wife.

The fact that at the date of the death of the husband the intervener's appeal was pending does not prevent the decree absolute operating so as to deprive the widow of her status as the wife of the deceased. The decree absolute dissolved the marriage from the moment it was pronounced and at the date when the appeal by the intervener abated it stood unreversed. The fact that neither spouse could remarry until the time for appealing had expired in no way affects the full operation of the decree. It is a judgment in rem and unless and until a Court of Appeal reversed it, the marriage was for all purposes at an end. [P 189 C 1]

(b) Divorce — Decree for — Intervention can be at anytime before decree is made absolute even beyond 6 months.

That the intervention had not taken place within six months of the decree nisi is immaterial. Intervention can always take place at any time before the decree is made absolute. However, it is within the discretionary power of the Court to refuse the extension. [P 190 C 2]

(c) Divorce — Decree for — If valid, subsequent affidavits do not make it invalid.

If the decree is valid the affidavit filed after it had been made could not render it invalid; if on the other hand the decree was ineffective as being made too soon it did not require an affidavit to avoid it. [P 191 C 1]

(d) Divorce—Intervention—Affidavit—Nature of.

The affidavit under R. 36 of the Rules framed under the Divorce Act must be of someone prepared to swear of his own knowledge to some relevant fact, or at least one which sets out the sources of information and swears to a belief therein. [P 191 C 1]

*A. S. Comyns Carr and S. N. Bernstein —
for Appellant.*

B. L. A. O'Malley — for Respondent.

Lord Goddard.—On 12th June 1936, the respondent issued a writ in the Supreme Court of Judicature, Jamaica, claiming to be the

only lawful brother, sole next of kin, and heir at law of Osmond Vincent Marsh, deceased, who died on 11th January 1936, intestate, and claiming administration of his estate. The writ was issued against the appellant because she had entered a caveat and had alleged that she was the widow of the deceased. The statement of claim denied the interest of the appellant and alleged that she had been divorced by the deceased, a decree nisi obtained by him on 10th January 1933, having been made absolute on 19th January 1934. By her defence the appellant disputed the validity of the decree absolute. Concisely stated the allegations set out in para. 3 of the defence were that on 15th January 1934 one E. A. L. Hodge, pursuant to S. 19 of the Divorce Law of 1879 and R. 35 of the Divorce Rules appeared in the proceedings to show cause against the decree being made absolute, but that the Court without notice to him and though the period within which under the rules he was permitted to file affidavits in support of his intervention had not expired, proceeded to make the decree absolute. It was further alleged that Hodge applied for leave to appeal to His Majesty in Council against the making of the decree absolute and that his application was refused by the Court but that special leave was granted by Order in Council dated 14th August 1934. Then it was pleaded that after the arguments before the Board were concluded but before judgment was delivered, it was ascertained that the deceased had died, whereupon an Order in Council was passed to the effect that the appeal had abated and no order was made except that the security lodged be returned to the said Hodge. On 1st March 1940, an order was made in the action whereby assuming the facts pleaded in the defence were established and assuming that the plaintiff is the only lawful brother and sole next of kin and heir at law of the deceased, certain points of law were set down for hearing before the trial. It is unnecessary to set out the seven points of law directed to be decided in extenso, as it is agreed that they all come down to the single question whether or not the decree absolute in the circumstances is valid. As the defendant expressly referred, in para. 3 of the defence, to the record in the divorce proceedings and in the subsequent appeal to this Board, there is no question but that the Court in Jamaica and their Lordships in the present appeal can refer to these documents for the purpose of elucidating the facts. The order directed that the points of law should be argued before the Court of Appeal and on 24th July 1941, that Court (Sir Robert Furness C. J., Seton and Savary JJ.) determined all the questions in favour of the plaintiff. By Order

in Council of 22nd July 1943, special leave to appeal against their judgment was granted.

On the hearing of the appeal Mr. Comyns Carr for the appellant formulated two questions. The first was does the fact that at the date of the death of the deceased the intervener's appeal was pending prevent the decree absolute operating so as to deprive the appellant of her status as the wife of the deceased. This of course assumes that the decree absolute was a valid decree and on that assumption the question admits of only one answer. It dissolved the marriage from the moment it was pronounced and at the date when the appeal by the intervener abated it stood unreversed. The fact that neither spouse could remarry until the time for appealing had expired in no way affects the full operation of the decree. It is a judgment in rem and unless and until a Court of Appeal reversed it the marriage was for all purposes at an end. The second question was whether the failure to comply with the rules relating to intervention, in that the decree absolute was pronounced on the third instead of the fourth day after the intervener had entered an appearance, renders the decree null and void. To answer this question it is necessary to examine the facts preceding the pronouncement of the decree in careful detail.

The hearing of the petition was in January 1933. In her answer the respondent, the present appellant, denied adultery and pleaded condonation but made no other cross charge. At the hearing she appeared in person and apparently made no attempt to prove the charge of condonation and declined any assistance from the learned Judge, stating she had no witnesses nor anything to say to the Court. He thereupon being satisfied with the petitioner's evidence pronounced a decree nisi. She seems then to have left Jamaica for England and here sought out Mr. Hodge who was an old friend of her family and it is said, an executor and trustee of her father's will. He determined to lay certain facts before the Attorney-General of Jamaica with a view to inducing him to intervene in the suit for the purpose of having the decree nisi rescinded. There is no official corresponding to the King's Proctor in the Colony and anyone who intervenes does so as a member of the public though doubtless in a proper case the Attorney-General would deem it his duty to intervene, albeit that in so doing he would technically be acting not in an official but a private capacity. It is not suggested that Mr. Hodge had any personal knowledge of the facts; the knowledge could only be derived from the information supplied by the present appellant,

who it should be stated had never appealed or attempted to appeal against the decree.

It will now be convenient to set out the relevant section of the Divorce Act and the rules relating to intervention. The rules are made under S. 7 of the Act and thus have statutory force. They are as follows:

Section 19. — "The decree shall not be made absolute till after the expiration of six months from the date of the decree nisi and during that period any person may show cause why the decree should not be made absolute, by reason of the same having been obtained by collusion, or by reason of material facts not brought before the Court. On cause being so shown, the Court shall deal with the case by making the decree absolute, or by reversing the decree nisi or by requiring further enquiry or otherwise as justice may require."

Rule 35. — "Any person wishing to show cause against making absolute a decree nisi for dissolution of a marriage shall enter an appearance in the cause in which such decree nisi has been pronounced."

Rule 36. — "Any such person shall at the time of entering an appearance, or within four days thereafter, file Affidavits setting forth the facts upon which he relies."

There are other rules dealing with the filing of affidavits in answer and reply and also with the mode of trial, but it is unnecessary to set them out. A motion to make the decree absolute was set down on 17th November 1933, for hearing on 20th November, accompanied by an affidavit that no person had obtained leave to intervene or had entered an appearance for that purpose as required by R. 45, and this was true. But meanwhile Mr. Hodge had forwarded to the Attorney-General the information he had obtained relating to alleged acts of connivance on the part of the petitioner, who it was said had encouraged his wife to commit adultery. It is said that this information comprised statements by nine persons, presumably resident in Jamaica, but it has never appeared in any of the subsequent proceedings how those statements were obtained, or whether they were statements actually taken from the proposed witnesses, or whether they were no more than what Mr. Hodge, from what the present appellant had told him, believed and hoped they would say if they were called. Then it appears that about 13th November 1933, the solicitors acting for Mr. Hodge in Jamaica placed before the Attorney-General "statements and evidence" relating to the matter. In view of what happened later this is a matter of some importance for it suggests that by 13th November the solicitors had actually obtained evidence from persons in the colony who could be called as witnesses. With this information before him the Attorney-General obtained an adjournment of the motion for two months, namely, till 15th January 1934, and during the interval it is said that further information was supplied to

him including statements by four out of the nine persons referred to above, so this again shows that the solicitors had some evidence in their possession. However, on 12th January 1934, the Attorney-General orally informed the solicitors that he did not propose to intervene but left it to Mr. Hodge to enter an appearance if he so desired. On the 15th the motion came on for hearing before the full Court, and the Attorney-General informed the Court that after investigating the matter he did not intend to take any further steps. Counsel for the petitioner then asked for a decree absolute, but the Registrar informed the Court that an appearance had been entered that morning for Mr. Hodge for the purpose of showing cause. The Chief Justice then said that "as a matter of precaution" the motion would be adjourned till Friday, 19th January. It seems that both the Court and the petitioner's counsel made the mistake of assuming that this would allow the four days within which the intervener must file his affidavits under R. 36, whereas in fact it only allowed three, and it is this mistake which has been the cause of all the trouble that has ensued. On 17th January the solicitors for Mr. Hodge filed a motion, returnable the next day, asking that the time for filing affidavits might be extended for ten weeks or such other time as the Court should think just, and on the 18th leading counsel appeared and supported the motion with an affidavit by the petitioner's solicitor. This stated that in consequence of the intimation from the Attorney-General that he did not intend to intervene instructions had been obtained by cable from Mr. Hodge in England in pursuance of which an appearance had been entered but that it was not possible to obtain an affidavit from him in the four days prescribed by the rule. It was further stated that an important deponent in support of the shewing cause was the respondent in the suit who was also then in England. No other intended deponent was mentioned. There was no suggestion that there was any evidence which had been or could be obtained from anyone in the colony, and it is at least remarkable that if the persons who had given statements were still willing witnesses and the evidence they could have given was considered trustworthy that their statements were not exhibited nor was the Court even told of their existence.

Moreover it appears from the judgment of Adrian Clark J. delivered on Mr. Hodge's application for leave to appeal to His Majesty in Council that his leading counsel informed the Court when he applied for the extension of time that unless it was granted he would be unable to file any affidavits. In view of this affidavit and the statement of counsel, it

seems clear that both the Court and the petitioner's representative were given to understand that unless an extension was granted Mr. Hodge would be unable to proceed with his intervention. In the result the Court declined to grant any extension of time, and the motion for decree absolute stood for the following day. Again, no one called attention to the fact that four days would not have elapsed since the appearance, and the Chief Justice said on the application for leave to appeal that had the attention of the Court been called to this fact he would have been willing to grant an adjournment to the following Monday to avoid the possibility of this point being taken though such adjournment would not have aided the intervener. In his judgment the Chief Justice when refusing leave to appeal stated that the facts which weighed with the Court in refusing an extension were—

- (1) The grounds of the proposed intervention were not stated and no reason was suggested why the petitioner was not entitled to a decree.
- (2) No intervention had taken place within the statutory six months; the matter had been already adjourned to enable the Attorney-General to make investigations, and after investigation, he had informed the Court that he did not propose to intervene.
- (3) It was not suggested that Mr. Hodge had any personal knowledge of any facts, which would influence the decision of the Court.
- (4) So far as appeared his only knowledge consisted of statements made to him by the respondent of the nature of which the Court was not informed.

Nevertheless their Lordships cannot but regret that some time was not allowed to the intervener, especially when it is remembered that his solicitors had only been informed of the decision of the Attorney-General on 12th January. That the intervention had not taken place within six months of the decree nisi was really immaterial, as it is established beyond question that, contrary to the view expressed by Adrian Clark J. in his judgment, intervention can always take place at any time before the decree is made absolute—(1864) 3 Sw. & Tr. 530.¹ However it was within the discretionary power of the Court to refuse the extension, and as the appeal subsequently brought by Mr. Hodge to His Majesty in Council abated by the petitioner's death the fact that their Lordships think an extension should have been granted cannot help the present appellant in these proceedings. As has already been said the Court and the petitioner's advisers were left on 18th January under the impression that

1. (1864) 3 Sw. & Tr. 530; 33 L. J. (Mat.) 129; 13 W. R. 109; 164 E. R. 1381, *Bowen v. Bowen & Evans*.

Mr. Hodge's intervention could not proceed, though that is not to say that he abandoned it so as to deprive himself of a right of appeal. On the following day at the sitting of the full Court at 10.15 A.M. counsel applied for the decree to be made absolute. The Registrar informed the Court that the intervener's solicitor had telephoned inquiring when the motion would be called and had been told that it would come after some criminal appeals from prisoners in custody had been heard, and the Court thereupon stood the motion over till later in the forenoon. When the application was renewed no one appeared to object and the decree was granted. It appears from the uncontradicted affidavit of Mr. Hart, the solicitor for the petitioner, that the solicitor for Mr. Hodge, who as already stated had inquired, and been informed, when the motion would be heard, was actually present in Court when the order was made, yet he gave no intimation to the Registrar or took any other steps to inform the Court either that he objected to the decree being made absolute before the four days had expired or that he intended to file an affidavit. Later in the day he filed an affidavit to which he himself was the deponent. Their Lordships do not think it necessary to express any opinion as to the probable reason he had for taking this step considering that the proceedings so far as the full Court were concerned were at an end: if the decree was valid the affidavit filed after it had been made could not render it invalid; if on the other hand the decree was ineffective as being made too soon it did not require this affidavit to avoid it. But there is some significance in the fact that the affidavit is no more than a statement of the grounds on which Mr. Hodge intended to rely in support of his intervention; in truth it was no more than a pleading or particulars. No facts were stated to be within the deponent's own knowledge nor did he even swear to his belief in any of the matters to which he deposed. Their Lordships agree with the opinion of the Court in *Jamaica* that such an affidavit is not one which should be regarded as complying with R. 36, and that for this purpose the affidavit must be that of someone prepared to swear of his own knowledge to some relevant fact, or at least, in their Lordships' opinion, one which sets out the sources of information and swears to a belief therein. But whether or not the affidavit complied with the rules is in the circumstances immaterial, except that it supports the view that on 19th January the solicitors for the intervener had no material evidence available in the Colony or if they had it was not of a character which they felt they would be justified in placing before the Court. No

one suggests that had the matter stood over till the following Monday the position would have been different in this respect.

Now on these facts it appears to their Lordships that there are only two possible views, and whichever is adopted the validity of the decree absolute is beyond question. The first way in which the matter may be put is that on 19th January 1934, six months had elapsed since the decree nisi was pronounced and the Court had therefore power to make the decree absolute unless there was an intervener prepared to show cause against it. An intervener had appeared but had on the previous day given the Court to understand that he did not intend to follow up his appearance by showing cause because he had not the necessary material available and would not be able to procure it within the time allowed. While no doubt he could have resiled from that position on the 19th he did not, but stood by and allowed the Court to proceed without giving any intimation that he had any objection or desired to take any further step though he had full knowledge that the Court was proceeding to make the order. For this purpose of course there is no distinction between the intervener himself and the solicitor representing him. In this view there was in the opinion of their Lordships no irregularity, because it must be open to an intervener to say that he does not intend to show cause and the way is then clear for a decree absolute provided that the statutory period has elapsed. The other view is that as the appearance stood and had not been withdrawn it was irregular to have proceeded before four days had elapsed. But it does not necessarily follow that because there has not been a literal compliance with the rules the decree is a nullity. A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. (1888) 20 Q. B. D. 764² and (1894) A. C. 494³ are leading examples of the former while (1889) 23 Q. B. D. 395⁴ may be said to illustrate the latter. The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No Court has ever attempted to lay down a decisive test for distinguishing between the two

2. (1888) 20 Q. B. D. 764 : 57 L. J. Q. B. 287 : 58 L. T. 671 : 36 W. R. 487, *Anlaby v. Praetorius*.

3. (1894) 1894 A. C. 494 : 63 L. J. Q. B. 737 : 71 L. T. 157 : 43 W. R. 113, *Smurthwaite v. Hannay*.

4. (1889) 23 Q. B. D. 395 : 58 L. J. Q. B. 382 : 61 L. T. 545 : 37 W. R. 565, *Fry v. Moore*.

classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice.

There is for instance an obvious distinction between obtaining judgment on a writ which has never been served and one in which, as in (1889) 23 Q. B. D. 395⁴ there has been a defect in the service but the writ had come to the knowledge of the defendant. (1911) 2 K. B. 942⁵ really depends on different considerations; it was a case depending on the application of positive law. The rule laid down in terms that before taking a certain step, namely proceeding in default, endorsement of service must be made on the writ. If this condition is not fulfilled the plaintiff cannot take advantage of this particular procedure. (1936) A. C. 177⁶ is an illustration of the rule that where there has been a defect in procedure which has not caused a failure of natural justice the resulting order is only voidable. Had the wife moved in that case before all parties, including herself, had remarried, as their Lordships understand that case, the result would have been different; the decree could have been recalled and a new trial ordered; as it was, it was too late, and by herself remarrying, the wife had adopted the decree. Then there is a third class of case. If a litigant has himself induced, acquiesced in or waived the irregularity he cannot afterwards complain of it. (1889) 23 Q. B. D. 395⁴ really falls within this class, being a case of waiver. Suppose a person knowing that another had issued or was about to issue a writ against him, wrote saying that he did not intend to appear and that so far as he was concerned judgment could be entered against him forthwith. If the plaintiff were able to persuade the Central Office to allow him on that letter to sign judgment before the time for appearance had expired, the de-

fendant could not be heard to say that the judgment was a nullity. True before it was signed he could have resiled and entered an appearance, but if he stood by and allowed the plaintiff to do that which he had been told he might do it would be impossible to treat the judgment as void, though if the defendant discovered he had a defence he might be allowed to set the judgment aside on terms. That is what really happened here; the intervener told the Court and the petitioner that if he could not get an extension he would not, because he could not, show cause. He might have changed his mind before advantage was taken of the attitude that was taken up by him. But he did not and allowed the order to be made in his presence without protest. Then there is another very important factor to be remembered: an intervener does not take action in the interest of either party. He intervenes solely in the interest of the public. If the Court wrongly disallows his intervention no right of either petitioner or respondent is affected. The respondent could have appealed against either decree and she did not, and she could not intervene. Different considerations might well arise if the Court were deceived into stopping an intervention. That is not the case here, and the Court have stated in terms their reasons for having acted as they did. The appeal brought by the intervener was ineffectual, it matters not for what reason, so he had no further right, and as the respondent to the petition failed to appeal she has no right to complain of the decree. In the opinion of their Lordships the decree absolute is valid and subsisting and the appellant's marriage to the deceased was finally dissolved as from its date. They will humbly advise His Majesty that this appeal should be dismissed. As the appellant is proceeding in *forma pauperis* there will be no order as to costs.

R.K.

Appeal dismissed.

— Solicitors for Appellant — *Piper Smith & Piper.*
Solicitors for Respondent — *Hutchinson & Cuff.*

5. (1911) 2 K. B. 942 : 80 L. J. K. B. 1341 : 105 L. T. 326, *Hamp Adams v. Hall.*

6. ('36) 23 A.I.R. 1936 P. C. 246 : 161 I. C. 260 : 1936 A. C. 177 : 105 L. J. P. C. 41 : 154 L. T. 221 (P.C.), *McPherson v. McPherson.*

END

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FEDERAL COURT OF INDIA
1945

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The Hon'ble Sir Patrick Spens, Kt., O.B.E.

PUISNE JUDGES :

The Hon'ble Sir Srinivasa Varadachariar, Kt., B.A., B.L., Rao Bahadur.
 " Dr. Sir Muhammad Zafrulla Khan, K.C.S.I., LL.D., Bar-at-law.

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THE ALL INDIA REPORTER

1945

FEDERAL COURT

A. I. R. (32) 1945 Federal Court 1
(From Calcutta)

13th November 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.

*Mukunda Murari Chakravarti and
others — Appellants*

v.

*Pabitrarmoy Ghosh and others —
Respondents.*

Case No. 26 of 1943.

(a) Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 3—Even if Act falls within Entry No. 4, List 3, Sch. 7, Government of India Act, no question of Act being repugnant to Civil Procedure Code arises.

Even if the Act is legislation in respect of "Civil Procedure" under Entry No. 4 List 3 Sch. 7, Government of India Act S. 107 (1) only enacts that the existing Indian law, viz., the Civil Procedure Code shall prevail as against the provincial legislation and that the Provincial law shall be void to the extent to which any of its provisions are repugnant to any provisions of the Civil Procedure Code. But the provisions of the Civil Procedure Code must be read subject to S. 4 (1) of that Code which saves any special power conferred by or under any other law for the time being in force. When they are so read no question of repugnancy between the provisions of the Civil Procedure Code e.g. O. 21, R. 24 and the provisions of the Bengal Act e.g. S. 3 can arise: ('42) 29 A. I. R. 1942 F. C. 27, *Rel. on*; ('42) 29 A. I. R. 1942 Cal. 49 (S.B.), *Ref.*

[P 2 C 1]

(b) Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 3 — Word "tenant" in—Meaning of.

The word 'tenant' in S. 3 is used in the popular sense that is of a person who was a tenant before the decree in ejectment was sought or obtained against him. The word therefore includes a tenant against whom a decree in ejectment has been passed.

[P 2 C 1]

*Sardar Raghubir Singh, Advocate, Federal Court,
instructed by Ganpat Rai, Agent —*

for Appellants.

*S. N. Mukherjee, Advocate, Federal Court, in-
structed by P. K. Bose, Agent —*

for Respondents.

*Sir Brojendra Mitter, Senior Advocate, Federal
Court, (K. K. Raizada, Advocate, Federal
Court, with him) instructed by B. Banerji,
Agent — for Advocate-General of Bengal.*

1945 F.C./1

Spens C. J.—Some of the appellants and the predecessors-in-title of the other appellants obtained a decree in ejectment against the respondents, on 8th February 1940; and it was confirmed on appeal on 15th May 1940. When the decree-holders applied for execution of this decree, on 4th June 1940, the defendants filed an application asking for stay of proceedings in terms of S. 3, Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (Bengal Act 9 of 1940) which had come into force on 30th May 1940. The decree-holders contended that this Act was ultra vires and inoperative; but this contention was overruled by the lower Courts as well as by the High Court at Calcutta. Against this decision of the High Court this appeal has been preferred.

The reasons for the decision pronounced by the High Court in this case will be found in an earlier judgment of a Special Bench of that Court, 74 C. L. J. 485.¹ The operativeness of the Bengal Act which did not receive the consent of the Governor-General was impugned on the ground that some of its provisions (including S. 3) were repugnant to the provisions of the Civil Procedure Code relating to execution of decrees and that to the extent of such repugnancy the Bengal Act was void under S. 107 (1), Government of India Act. This contention was met by the High Court by two answers: (1) that the Bengal Act was covered by entries Nos. 2 and 21 of List 2, Sch. 7, Constitution Act and that therefore S. 107 had no application to the case; and (2) that even if, as contended, the Act should be held to fall under entry No. 4 of List 3, its operation was saved by S. 4 (1), Civil P. C. Both these grounds have been challenged before us on behalf of the appellants. In the view we take on the second ground, it is unnecessary to express any opinion on the first.

Assuming that the impugned Act is legis-

1. ('42) 29 A.I.R. 1942 Cal. 49 : I.L.R. (1942) 1 Cal. 497 : 198 I. C. 136 : 74 C. L. J. 485 (S.B.), *Sukumari Debi v. Rajdhari Pandey*.

lation in respect of "civil procedure" (entry No. 4 in List 3), S. 107 (1) only enacts that the existing Indian law, viz., the Civil Procedure Code shall prevail as against the provincial legislation and that the provincial law shall be void to the extent to which any of its provisions are repugnant to any provisions of the Civil Procedure Code. It is contended on behalf of the appellants that S. 3 of the impugned Act, in so far as it directs that all proceedings for ejectment even in execution of decrees shall be stayed for a number of years, is repugnant to O. 21, R. 24, Civil P. C., which directs that the Court shall issue its process for the execution of the decree once the prescribed preliminary measures have been taken. But this rule of the Code must be read subject to S. 4 (1) which saves any special power conferred by or under any other law for the time being in force. When it is so read, no question of repugnancy between the Civil Procedure Code and the impugned Act will arise : *see* (1942) F.C.R. 53² at pp. 58-59.

It was faintly argued that even on the terms of S. 3, Bengal Act, the order of the Courts below was not justified, as the section is limited to proceedings against a "tenant" and a person against whom a decree in ejectment had been passed could no longer be spoken of as a tenant. As pointed out by the High Court, it is clear from the tenor of the section that the word "tenant" is there used in the popular sense, that is of a person who was a tenant before the decree in ejectment was sought or obtained against him. The appeal fails and is dismissed with costs.

G.N.

Appeal dismissed.

2. ('42) 29 A.I.R. 1942 F.C. 27 : I.L.R. (1942) Kar. F.C. 40 : I.L.R. (1942) Lah. 623 : (1942) 4 F.C.R. 53 (F.C.), *Megh Raj v. Allah Rakhia*.

* * A. I. R. (32) 1945 Federal Court 2

(*From Calcutta* : ('44) 31 A. I. R. 1944 Cal. 196 S. B.)

12th December 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.

Bank of Commerce, Ltd., Khulna

v.

Kunja Behari Kar and others.

Appeal Nos. 5 to 11 of 1944.

* (a) Government of India Act (1935), Ss. 100 and 107, Sch. 7 Lists I and II—Validity of provincial legislation—Encroachment by legislation with respect to List II on subjects in List I—Test for validity laid down.

The question of the validity of provincial legislation with respect to a matter enumerated in List II is not finally settled by a decision that the legislation is in pith and substance one dealing with such a matter. The opening words of sub-s. (3) of S. 100—"Subject to the two preceding sub-sections"—import a further limitation on the provincial power, because

sub-s. (1) which is thus incorporated in sub-s. (3) enacts that notwithstanding anything contained in sub-s. (3), a Provincial Legislature shall not have power to make laws with respect to any of the matters enumerated in List I. A provincial legislation can, if at all, encroach on List I subjects, only incidentally. Mere incidental encroachment would not amount to a transgression of the prohibition imposed on the Provincial Legislature by sub-s. (1). It would not be sufficient if the impugned provisions in a provincial enactment were incidental to a subject enumerated in the Provincial List; their incidental character must be determined with reference to their relation to the subjects enumerated in List I. Whether a provincial Act which indirectly interferes, in some degree, with one of the powers of the Indian Legislature is or is not ultra vires must be determined in each case as it arises : (1937) A. C. 863 ; (1943) A. C. 356 and (1939) A. C. 117, *Rel. on*.

[P 4 C 2; P 5 C 1, 2; P 6 C 1]

* * (b) Bengal Money-Lenders Act (10 of 1940), Ss. 30, 36 and 38—Ss. 30, 36 and 38 substantially affect Entry 28 of List I of Sch. 7, Government of India Act, with respect to promissory notes and to that extent are ultra vires : 213 I. C. 171 = ('44) 31 A.I.R. 1944 Cal. 196, *OVERRULED*.

The rules enacted in Ss. 32, 79 and 80, Negotiable Instruments Act, are among the essentials of the law relating to promissory notes and since the provisions of Ss. 30, 36 and 38, Bengal Money-Lenders Act, affect them substantially and cannot be regarded as merely amounting to an incidental encroachment on the law relating to promissory notes, the provisions of Ss. 30, 36 and 38 of the Provincial Act are ultra vires so far as claims on promissory notes are concerned : 213 I.C. 171 = ('44) 31 A.I.R. 1944 Cal. 196, *OVERRULED*. [P 6 C 1]

(c) Government of India Act (1935), Sch. 7, List I Entry 28—Entry is not restricted to negotiable instruments only since some promissory notes are non-negotiable : 213 I. C. 171 = ('44) 31 A. I. R. 1944 Cal. 196, *OVERRULED*.

There is no warrant for limiting the three specified categories of documents in Entry 28 to instruments which are negotiable. Non-negotiable promissory notes are known to the law and are recognised by the Negotiable Instruments Act. Some of the provisions of the Negotiable Instruments Act specifically refer to "negotiable instrument;" but other sections refer to "promissory note, bill of exchange or cheque" and there is no justification for limiting these latter provisions to only such documents as are negotiable. Even if it were possible to limit Entry 28 to negotiable instruments, there is no justification for importing the further limitation that this entry relates to only so much of the law as bears on the negotiability of such instruments and its consequences : 213 I.C. 171 = ('44) 31 A.I.R. 1944 Cal. 196, *OVERRULED*. [P 6 C 2]

In this view as to the scope of Entry 28 in List I, the attack against the impugned provisions of the Bengal Act will not be met by treating them as legislation with respect to "contracts" (Entry 10 of List III) because sub-s. (2) of S. 100 makes even legislation on List III matters "subject to the preceding sub-section," whenever such legislation is enacted by a Provincial Legislature. [P 6 C 2]

P. C. Basu, Senior Advocate, Federal Court (Sris Chandra Dutt, Advocate, Federal Court, with him) instructed by Ganpat Rai, Agent—

for Appellant.

S. M. Bose, Advocate-General of Bengal (K. K. Basu, Advocate, Federal Court with him) instructed by B. Banerji, Agent—Intervener (intervened on behalf of the Province of Bengal).

Spens C. J.—These appeals raise for decision a question which was left open in two previous judgments of this Court, viz., the validity of debt relief legislation enacted by Provincial Legislatures, so far as such legislation affects claims on promissory notes. The question now arises under the Bengal Money-Lender's Act, 1940 (hereinafter referred to as the Act). Section 30 of the Act contains various provisions limiting the amount and rate of interest recoverable by a lender "notwithstanding anything contained in any law for the time being in force, or in any agreement." Section 31 either prohibits or limits the award of post-decree interest. Section 36 empowers the Court to reopen transactions and accounts between the parties and also decrees and to release the borrower of all liability in excess of the limits specified in clauses (1) and (2) of S. 30 and even to direct the lender to repay sums recovered in excess of the said limits. Under S. 38, the borrower may himself make an application asking the Court to take accounts between him and the lender in accordance with the provisions of the Act and declaring the amount due on that basis. This provision seems to have been made with a view to facilitate a tender or deposit of the amount so declared due (S. 39). Section 2 (12) (e) makes it clear that the provisions of the Act were intended to apply even to loans advanced on the basis of promissory notes.

The appellant in all these cases is "the Bank of Commerce, Ltd., Khulna," an incorporated body, which by an order dated 12th May 1941, passed by the High Court at Calcutta under S. 153A, Companies Act, became entitled to the assets of another registered company known as the Khulna Loan Bank, Ltd. (which for some time was also known as the Khulna Loan Company, Ltd.). The proceedings out of which these appeals arise were in some instances initiated by the lender, by way of small cause suits, and in the other instances, by the debtors, by way of applications under S. 38 of the Act. Though the proceedings commenced only during 1941, 1942 and 1943, they all related to promissory notes which had been executed many years earlier in favour of the Khulna Loan Company or the Khulna Loan Bank. In all these proceedings, the debtors pleaded that the amount recoverable from them should be ascertained on the basis of the provisions contained in the Act. The creditor company insisted that it was entitled to recover the full amount due as per terms of the document, after giving credit for payments made towards interest or in part satisfaction of the debt. It was contended on its behalf that the Act was wholly ultra vires the Provincial Legislature or that so much at

least of the Act as affected the rights of banks generally and the right of promissory note holders to recover the full amount due on their promissory notes was invalid. The Court of first instance overruled this contention of the bank and fixed the liability of the debtors on the basis of the provisions of the Act. The matter was carried on revision to the Calcutta High Court, but the revision petitions were dismissed. Hence these appeals.

Before referring to the judgment of the High Court, it will be convenient to state what had happened when certain aspects of the present question were raised before this Court on the two previous occasions above-mentioned. The first case 1940 F. C. R. 188¹ arose under the Madras Agriculturists' Relief Act, 1938, which contained provisions resembling, in some measure, the provisions of the impugned Bengal Act. The Madras Act did not in terms refer to promissory notes but it defined "debt" in terms wide-enough to include debts due under promissory notes. The claim in that particular case, though it arose out of a promissory note, had passed into a claim under a decree, even before the Agriculturists' Relief Act was enacted. On this ground, this Court by a majority held that it was unnecessary to pronounce upon the validity of that Act so far as it affected promissory notes as such. Sulaiman J., who dissented, was of the opinion that no distinction could be made merely on the ground that a promissory note claim had merged in a decree before the passing of that Act and he held that its provisions could not take effect as against such claims, whether they had already passed into decrees or still remained due as claims on promissory notes. Various aspects of the question were touched on in the course of the argument in that case and some of them were also discussed in the judgments. One point (relevant to the present case) was whether the offending provisions, if any, in that Act should be held to be void under S. 100, Constitution Act or merely to be void to the extent of repugnancy with other laws, under S. 107, Constitution Act. The Chief Justice did not discuss this question. Sulaiman J. went into it at some length and was of the opinion that the question should be decided by the application of the test of repugnancy. As there was some difficulty in bringing the case within the language of S. 107, Constitution Act, the learned Judge held that the same result must be reached by the application of what has been described as the "Doctrine of Occupied Field" in cases

1. (41) 28 A. I. R. 1941 F.C. 47; I.L.R. (1941) Kar. F.C. 25; (1940) 2 F.C.R. 188 (F.C.), Subrahmanyam Chettiar v. Muttuswami Goundan.

decided under the British North America Act. The point was adverted to in the judgment of Varadachariar J. but no opinion was expressed.

The next occasion when this Court had to consider this question arose in 1944 F. C. R. 126.² That was also an appeal by the present appellant and the question arose in connexion with the very enactment now under consideration, viz., the Bengal Money-Lender's Act. There too, the appellant's claim, though arising out of a promissory note, had passed into a claim under a decree, before the Bengal Act was passed. The case was therefore governed by the decision of the majority in the Madras case. Certain grounds on which counsel for the appellant sought to distinguish the Madras case were examined and were held not to constitute grounds sufficient to lead to a different result. As a wide field was however covered by the argument, the judgment dealt with some of the points urged, without merely following the earlier decision. After observing that the Bengal Money-Lender's Act, taken as a whole, must be held to fall within the description "money-lending and money-lenders" (Entry 27 in List 2 of Sch. 7, Constitution Act), this Court added "the fact that among the documents on which moneys may be lent promissory notes form an important class will not justify the view that the regulation and control of money-lending have to that extent been taken out of the purview of provincial legislation."

Referring to the judgment of Sulaiman J. in the Madras case, it was observed that even that line of argument would not support the plea of ultra vires but would only bring in the principle of repugnancy. In answer to the argument that the whole Act should be held to be ultra vires the Provincial Legislature, even if some alone among its provisions were invalid, it was stated that

"where the problem can only be one of conflict between the provisions of the local law and the provisions of a central enactment, each being intra vires the particular Legislature, it is unnecessary to invoke the rule of severability to uphold the validity of the impugned enactment."

The observation that the test of repugnancy and not the rule of ultra vires was to be the governing principle was repeated in dealing with the argument that unlike the Madras Act, the Bengal Act was made applicable even to decrees that might be passed after 1940, in respect of promissory note claims.

It was in the light of the two judgments of this Court above referred to that the High Court at Calcutta dealt with the present

batch of cases. The learned Judges quoted the observation in 1944 F.C.R. 126² that the Act, taken as a whole, fell within the description "money-lending and money-lenders" and was not wholly void as ultra vires the Provincial Legislature. They next pointed out that according to that judgment, it was the doctrine of repugnancy and not the doctrine of ultra vires that had to be applied in the determination of the case. Taking the cue from an observation of Gwyer C. J. in 1940 F. C. R. 188¹ they construed Entry 28 in List I of Sch. 7, Constitution Act as limited to "legislation with respect to the negotiable aspect" of the instruments referred to in that entry and held that other aspects of such instruments though dealt with by the Negotiable Instruments Act, 1881, really pertained to the heads of "contract" and "evidence" which are subjects comprised in the Concurrent Legislative List. In this view interest even when due under promissory notes was, in their opinion, a matter of contract, at any rate so long as the rights of holders in due course did not come into the picture. As the Act had received the assent of the Governor-General, the learned Judges held that its provisions were to this extent not only valid but, under S. 107 (2), Constitution Act, also prevailed against the corresponding provisions of the Negotiable Instruments Act. This line of argument has since been followed and amplified by the Patna High Court in 28 Pat. 618,³ though Meredith J. would have preferred to hold that the matter was governed by S. 100, Constitution Act.

Before this Court, it was contended on behalf of the appellant that, on the true interpretation of S. 100, Constitution Act, a provincial enactment even with respect to a matter enumerated in List II would be ultra vires, if and in so far as it affected any subject enumerated in List I and that the statement in 1944 F. C. R. 126² that such instances should be judged only by the test of repugnancy should be reconsidered. As the relevant observations in the previous judgments were only obiter, we invited counsel to deal fully with all aspects of the question, unhampered by those observations. The decisions on the British North America Act and the principles of interpretation to be gathered from them have been referred to at some length in the previous judgments. It will be sufficient to state the result of their application here with due regard to the language of S. 100, Constitution Act. We agree with the appellant's contention that the question of the validity of provincial legislation with respect to a matter enumerated in

2. ('44) 31 A. I. R. 1944 F.C. 18; I.L.R. (1944) Kar. F. C. 46; (1944) 6 F.C.R. 126; 212 I.C. 138 (F. C.), The Bank of Commerce, Ltd. v. Amulya Krishna Basu Roy.

3. ('44) 31 A. I. R. 1944 Pat. 303; 28 Pat. 618, Deo Nandan Prasad v. Ram Prasad.

List II is not finally settled by a decision that the legislation is in pith and substance one dealing with such a matter. The opening words of sub-s. (3) of that section — "subject to the two preceding sub-sections" — import a further limitation on the provincial power, because sub-s. (1) which is thus incorporated in sub-s. (3) enacts that notwithstanding anything contained in sub-s. (3), a provincial Legislature shall not have power to make laws with respect to any of the matters enumerated in List I. This limitation was taken note of by Sulaiman J. in 1940 F.C.R. 188¹ at pp. 217-218. But he thought that the rigour of the literal interpretation of these words was "relaxed" by the use of the words "with respect to" in sub-s. (1) and that accordingly a mere incidental encroachment on a List I subject was not forbidden to the provincial Legislature, if its enactment was in pith and substance one relating to a List II matter. Where however even such incidental encroachment conflicted with pre-existing central legislation, he held that the Doctrine of Occupied Field should be invoked and the central legislation allowed to prevail. The observations in 1944 F. C. R. 126² followed this line of reasoning so far as it related to the effect of S. 100, but they omitted to incorporate the limitation mentioned by Sulaiman J. that in such cases a provincial legislation can, if at all, encroach on List I subjects, only incidentally. The limitation is however implicit in the passage cited in that judgment from S. 19 of Lefroy's *Treatise on Canadian Constitutional Law*.

Counsel for the appellant contended that the incidental encroachment permitted to the provincial Legislature under the British North America Act must be held to be a peculiarity of the Canadian Constitution and that even such encroachment on a List I subject by a provincial Legislature in India would be a contravention of the absolute terms of prohibition employed in sub-s. (1) of S. 100, Constitution Act. We are unable to accede to this contention. The view that mere incidental encroachment would not amount to a transgression of the prohibition imposed on the provincial Legislature by sub-s. (1) is supported by the observations of Lord Atkin in (1937) A. C. 863⁴ at pp. 869-870. There, the Parliament of Northern Ireland was empowered to make laws for the peace, order and good government of Northern Ireland but it was not to make laws "in respect of trade" with any place out of Northern Ireland. One of its enactments known as the Milk Act was impeached on the ground that its provisions practically put an end to the trade in milk between customers resident within Northern Ireland

and farmers resident outside the limits of Northern Ireland. The Judicial Committee held that the Milk Act was not a law "in respect of trade" but a law for the peace, order and good government of Northern Ireland; and it was said

"if on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field."

Towards the end of the judgment it was added, "though it may incidentally affect trade with county Donegal, it is not passed in respect of trade and it therefore is not subject to attack on that ground."

In our judgment, a like interpretation should be placed on the words "with respect to" in S. 100 (1), Constitution Act.

The difference between the operation of the rule of ultra vires and the effect of the Doctrine of Occupied Field has been brought out in the recent judgment of the Judicial Committee in 1943 A. C. 356.⁵ After noticing that in respect of the subjects specifically enumerated in S. 91 of the British North America Act (as distinguished from the general words peace, order and good government), the Dominion Legislature alone had exclusive legislative authority, their Lordships observed:

"it follows that legislation coming in pith and substance within one of the classes specially enumerated in S. 91 is beyond the legislative competence of the provincial Legislatures under S. 92. In such a case it is immaterial whether the Dominion has or has not dealt with the subject by legislation or, to use other well-known words, whether that legislative field has or has not been occupied by the legislation of the Dominion Parliament."

It was next pointed out,

"since 1894, it has been a settled proposition that if a subject of legislation by the province is only incidental or ancillary to one of the classes of subjects enumerated in S. 91 and is properly within one of the subjects enumerated in S. 92, then legislation by the province is competent unless and until the Dominion Parliament chooses to occupy the field by legislation."

If such is the position of provincial legislation under the British North America Act, provincial legislation in this country can stand on no better footing, in view of the language of sub-s. (1) of S. 100 which expressly denies power to the Provincial Legislature to make laws with respect to any of the matters enumerated in List I. The observations of Viscount Maugham in 1943 A. C. 356⁵ show that it would not be sufficient if the impugned provisions in a provincial enactment were incidental to a subject enumerated in the Provincial List; their incidental character must be determined with reference to their relation to the subjects enumerated in List I. The decision of these appeals will therefore

5. (1943) 30 A.I.R. 1943 P. C. 76 : 1943 A. C. 356 : 207 I. C. 327 (P. C.), Attorney-General for Alberta v. Attorney-General for Canada.

4. (1937) 1937 A. C. 863, Gallagher v. Lynn.

depend upon the determination of the question whether the provisions of the impugned Act encroach upon List I subjects to any substantial extent or whether the interference is only incidental in the sense above explained. As observed in 1939 A. C. 117⁶ the question

"whether a provincial Act which indirectly interferes, in some degree, with one of the powers of the Dominion is or is not ultra vires must be determined in each case as it arises."

It was contended on behalf of the appellant that the Bengal Money-Lender's Act interferes not merely incidentally but substantially with at least two of the matters enumerated in List I of Sch. 7, Constitution Act. By making Ss. 30, 36 and 38 applicable to claims under promissory notes, it was said that, the Act was an invasion of Entry 28. It was also pointed out that by discriminating between "notified banks" and "other banks" (S. 3) and imposing disabilities, penalties and restrictions of various kinds on "non-notified banks" the Act encroached on Entry 38. In the view we take of the complaint of encroachment of Entry 28, it is not necessary for the decision of these appeals to deal with the argument advanced with reference to Entry 38. It was contended that the rules enacted in Ss. 32, 79 and 80, Negotiable Instruments Act were among the essentials of the law relating to promissory notes and that the provisions of Ss. 30, 36 and 38 of the impugned Act affect them so substantially that it would be impossible to regard them as merely amounting to an incidental encroachment on the law relating to promissory notes. This contention is in our judgment well-founded.

The Advocate-General of Bengal could not deny that the encroachment, if any, was serious and substantial, but he contended that in view of the collocation of the several kinds of documents grouped together in Entry 28, the scope of that entry must be limited in two ways—first, by assuming that it related only to negotiable instruments and secondly, as an inference from this limitation, that it related only to so much of the law as bore upon the negotiability of such instruments. On this assumption, he maintained that the impugned Act did not encroach on entry 28 of List I and he endeavoured to show that the Act had carefully refrained from touching the principle of negotiability or the consequent rights of holders in due course. Stressing the distinction between the indorsement of a note and the assignment of the debt evidenced by the note, the Advocate-General endeavoured to point out that the Act limited itself to a regulation of the rights of the assignees of the debt and

never dealt with the rights of the indorsees of the note and particularly of the rights of holders in due course. He further contended that the rights as between the promisor and the promisee, including the right to interest, were only matters pertaining to the Law of Contracts and should not be held to be comprised in Entry 28 of List I. We are unable to accede to this argument. The entry expressly refers to "cheques, bills of exchange and promissory notes" and then adds "and other like instruments." Whatever may be the result of construing these added words in the light of the ejusdem generis rule, we see no warrant for limiting the three specified categories of documents to instruments which are negotiable. Non-negotiable promissory notes are known to the law and are recognised by the Negotiable Instruments Act. Some of the provisions of the Negotiable Instruments Act specifically refer to "negotiable instrument"; but other sections refer to "promissory note, bill of exchange or cheque" and there is no justification for limiting these latter provisions to only such documents as are negotiable. Even if it were possible to limit Entry 28 to negotiable instruments, there is no justification for importing the further limitation that this entry relates to only so much of the law as bears on the negotiability of such instruments and its consequences.

The Advocate-General drew our attention to certain observations in (1921) 2 A. C. 91⁷ and 1915 A. C. 330⁸ and contended that they recognised the possibility of provincial legislation being valid and operative to a certain extent even as against companies incorporated under Dominion Laws. These observations must be understood in the light of the distinction recognised in the Canadian cases between the relation of S. 92, British North America Act to the powers conferred upon the Dominion Parliament by the general words "peace, order and good government" of Canada in S. 91 and the relation of the Provincial Legislature to the topics exclusively assigned to the Dominion Parliament by specific enumeration in S. 91. We may add that in the view that we take as to the scope of Entry 28 in List I, the attack against the impugned provisions of the Bengal Act will not be met by treating them as legislation with respect to "contracts" (Entry 10 of List III) because sub-s. (2) of S. 100 makes even legislation on List III matters "subject to the preceding sub-section", whenever such legislation is enacted by a Provincial Legislature. The appeals are allowed and the cases will

6. ('39) 26 A.I.R. 1939 P. C. 53 : 1939 A. C. 117 (P.C.), Attorney-General for Alberta v. Attorney-General for Canada.

7. ('21) 8 A.I.R. 1921 P. C. 148 : (1921) 2 A. C. 91 (P.C.), Great West Saddlery Company v. The King.

8. ('14) 1 A.I.R. 1914 P. C. 174 : 1915 A. C. 330 (P.C.), John Deere Plow Co. Ltd. v. Wharton.

be remitted to the High Court at Calcutta with a declaration that in place of the present decrees, revised decrees for amounts found due according to the terms of the promissory notes, after giving due credit for payments made, shall be substituted. The revised decrees will also provide for the costs of the appellant in the High Court and in the court of first instance. The appellant is entitled to costs here. In view of the pettiness of the amounts involved in these cases and of the circumstances in which the appellant had to bring them to this Court, we consider that this is a fit case for directing payment of a sum in gross in lieu of taxed costs (O. 35, R. 5). We fix the total amount at Rs. 1400 and dividing it equally between the seven cases, we direct the respondent (or respondents) in each case to pay Rs. 200 to the appellant for the costs of the appeal. Leave to appeal to His Majesty in Council granted.

R.K.

*Appeals allowed.***A. I. R. (32) 1945 Federal Court 7***(From Calcutta)*

12th December 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.*Bank of Commerce, Ltd., Khulna —
Appellant*

v.

*Nripendra Nath Datta and others —
Respondents.*

Appeal Nos. 1 to 4 of 1944.

(a) Bengal Money-Lenders Act (10 of 1940),
Ss. 36 and 30 — Decrees on pronotes passed
before Act—Provision for re-opening of decrees
is not ultra vires.

Any argument based on the exclusion of promissory notes from the sphere of provincial legislation cannot avail in cases where the promissory notes had merged in decrees made before the commencement of the provincial Act, namely, the Bengal Money-Lenders Act. Consequently S. 36 in providing for the re-opening of decrees on pronotes passed before the Act and passing new decrees cannot be said to be ultra vires the Provincial Legislature: ('44) 31 A.I.R. 1944 F. C. 18, *Foll.* [P 7 C 1]

(b) Bengal Money-Lenders Act (10 of 1940),
Ss. 30, 36 and 38 — Ss. 30, 36 and 38 held to be
invalid by Federal Court severable from rest of
Act—Act is not wholly void.

An Act cannot be held to be wholly void merely because part of the Act is held to be invalid when the invalid part is severable from the rest. Accordingly the Bengal Money-Lenders Act cannot be held to be wholly void merely because some of its provisions, namely, Ss. 30, 36 and 38 have been held to be invalid and ultra vires the Provincial Legislature by the Federal Court in ('45) 32 A. I. R. 1945 F. C. 2, because the invalid provisions are separable from the rest of the Act: ('44) 31 A. I. R. 1944 F. C. 18, *Ref.* [P 7 C 1]

(c) Bengal Money-Lenders Act (10 of 1940),
Ss. 30 and 36 — Entry 38 "Banking" in List I,Sch. 7, Government of India Act — Scope of —
Ss. 30 and 36 do not affect subject of "Banking."

A law of limitation or a law relating to the compulsory acquisition of land may affect the rights of a bank just as they may affect the rights of other suitors or property owners. It would be too much to say that every law, which in its operation might affect the property or interests of a bank just as it affects the property or interests of other persons, would constitute an encroachment on Entry 38, List I, Sch. 7, Government of India Act. On a reasonable construction the aforesaid entry must be limited to laws which affect the conduct of the business of banks qua banks. Accordingly Ss. 30 and 36, Bengal Money-Lenders Act, cannot be said to interfere with "conduct of banking business" in Entry 38, List I, Sch. 7, Government of India Act, merely because the application of those sections will greatly reduce the amount which a bank can recover in execution of decrees obtained by it: (1942) S. C. R. (Can.) 31 and ('43) 30 A. I. R. 1943 P. C. 76, *Ref.*

[P 8 C 1, 2]

*P. C. Basu, Senior Advocate, Federal Court
(Sris Chandra Dutt, Advocate, Federal Court
with him) instructed by Ganpat Rai, Agent—
for Appellant.*

*S. M. Bose, Advocate-General of Bengal (K. K.
Basu, Advocate, Federal Court, with him) in-
structed by B. Banerji, Agent — Intervener
(intervened on behalf of the Province of Bengal).*

Spens C. J.—In this batch of appeals also, the question for decision relates to the validity and operation of Ss. 30 and 36, Bengal Money-Lender's Act, 1940. In these cases however, the lender's rights, though based on promissory notes, had passed into claims under decrees before the enactment of the Act. They are thus *ad idem* with (1944) F. C. R. 126.¹ In the ordinary course, we should have contented ourselves with merely following that decision. But, as in the connected batch (Civil Appeals Nos. 5 to 11 of 1944)² we have held that the Act is in some measure invalid a further contention which was left open in (1944) F. C. R. 126¹ must be considered, viz., that if the Act is in some respects at least ultra vires the provincial legislature, it must be held to be wholly invalid. We are of the opinion that in the present case, the part of the Act which we have held to be invalid is severable from the rest of the Act and that the Act cannot be held to be wholly void.

It was next contended that certain provisions in the Act which affect banks were also ultra vires the provincial legislature as interfering with the matter of entry 38 of List I, "banking, that is to say, the conduct of banking business by corporations." Attention was in this connexion drawn particularly to the provisions of S. 2, cls. (1) and (12) (d) and Ss. 3, 8 and 13. Relying upon the decision

1. ('44) 31 A.I.R. 1944 F. C. 18 : I.L.R. (1944) Kar. F. C. 46: (1944) 6 F.C.R. 126: 212 I. C. 138 (F.C.), Bank of Commerce Ltd. Khulna v. Amulya Krishna Basu.

2. Reported in ('45) 32 A.I.R. 1945 F. C. 2.

of the Judicial Committee in (1894) A. C. 31,³ counsel for the appellant argued that these sections constituted a serious interference with the conduct of banking business in the province. These provisions however do not directly affect the present case as the decrees to which they relate had been obtained before the passing of the Act. The question of their invalidity is raised here only to support the argument, that if some portions of the Act are invalid the legislation as a whole must be held to be invalid. In the view that we have already expressed on the question of severability, which we should have no difficulty in applying to the provisions in question here, we are not prepared to accept this contention. We accordingly express no opinion on the question whether these particular sections are valid or not.

The validity of ss. 30 and 36 of the Act was also impugned on the ground that even these provisions affect the subject of "banking." As the liabilities of the debtors in these cases have been fixed with reference to the provisions of these sections it is necessary to deal with this contention separately. Our attention was drawn in this connexion to certain observations of Duff C. J. in (1942) S. C. R. (Can) 31.⁴ A number of objections to the validity of the legislation then in question were considered by the Supreme Court in that case, but when the matter went on appeal to the Judicial Committee in (1943) A. C. 356,⁵ their Lordships dealt with only one objection (not relevant to the present case) and expressed no opinion on the other points. It has been argued before us that as the application of ss. 30 and 36 of the Act will greatly reduce the amount which a bank can recover in execution of decrees obtained by it, these provisions must be held to constitute a serious interference with the conduct of banking business. This contention seems to us to rest on an unduly wide interpretation of the expression "conduct of banking business." A law of limitation or a law relating to the compulsory acquisition of land may affect the rights of a bank just as they may affect the rights of other suitors or property-owners. It would be too much to say that every law which in its operation might affect the property or interests of a bank just as it affects the property or interests of other persons, would constitute an encroachment on entry

38 of List I. On a reasonable construction, the entry must be limited to laws which affect the conduct of the business of banks qua banks. In this view, we must overrule this last objection to the validity of these sections. The appeals fail and are dismissed. As the respondents have not appeared, there will be no order as to costs. Leave to appeal to His Majesty in Council granted.

G.N. *Appeals dismissed.*

A. I. R. (32) 1945 Federal Court 8
(*From Lahore: ('43) 30 A. I. R. 1943*
Lah 233.)

26th April 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.

Mohammad Hussain and others —
Appellants

v.

Sajawal Baksh and others—Respondents.
Case No. 24 of 1943.

Punjab Pre-emption Act (1 of 1913), S. 15 —
Right of pre-emption under S. 15 based on relationship with vendor — Right is not rendered invalid by S. 298 (1), Government of India Act.

Where a pre-emptor claims to exercise a right of pre-emption by virtue of his relationship to the vendor, no doubt he bases his claim upon his own descent from the vendor or from some ancestor common to the vendor and himself. But because the right of pre-emption is based on descent, it cannot be argued that the effect of the exercise of that right is to prohibit the acquisition or holding of property by a vendee who is either not related to the vendor at all or is not related to him so nearly as the pre-emptor. No prohibition is in such a case imposed upon the vendee on account of his descent or lack of descent from any particular person. Nor does the grant of a right to one person to acquire property in preference to other persons amount to a prohibition against the acquisition or holding of property by those persons. Therefore, S. 298 (1), Government of India Act, does not operate to render invalid a right of pre-emption under S. 15, Punjab Pre-emption Act, based upon relationship with the vendor.

[P 9 C 1]

K. K. Raizada, Advocate, instructed by B. Banerji, Agent — for Appellants.

M. Sleem, Advocate-General, Punjab (with S. M. Sikri), instructed by Tarachand Brijmohanlal — for the Punjab Province, appeared in response to notice issued under O. 36, R. 1, Federal Court Rules, 1942.

Zafrulla Khan J.—This is a defendants' appeal founded on the usual certificate under S. 205 (1), Constitution Act, from a judgment of the Lahore High Court granting the plaintiffs a decree for possession of land by pre-emption of a sale made in favour of the defendants. The question for determination in the appeal is whether those portions of S. 15, Punjab Pre-emption Act (Punjab Act 1 of 1913) which confer upon the heirs of a vendor a right of pre-emption in respect of

3. (1894) 1894 A. C. 31, *Tenant v. Union Bank of Canada*.

4. (1942) 1942 S. C. R. (Can.) 31, *Reference as to Validity of the Debt Adjustment Act, Alberta*.

5. ('43) 30 A.I.R. 1943 P. C. 76 : 1943 A. C. 356 : 207 I. C. 327 (P.C.), *Attorney-General for Alberta v. Attorney-General for Canada*.

sales of land are repugnant to the provisions of S. 298 (1), Constitution Act. This section provides, inter alia, that no subject of His Majesty domiciled in India shall on the ground only of descent be prohibited from acquiring or holding property. The appellants' contention was that inasmuch as the effect of the relevant portions of S. 15, Punjab Pre-emption Act, was to enable the heirs of a vendor ultimately to deprive the vendee of the benefit of a sale made in his favour, the vendee was by virtue of these provisions in effect prohibited from acquiring property, or having acquired it was prohibited from continuing to hold it. We do not think there is any force in this contention. Section 4, Pre-emption Act, defines the right of pre-emption as the right of a person to acquire certain descriptions of property in preference to other persons, and limits its operation in the case of land to sales. Where a pre-emptor claims to exercise a right of pre-emption by virtue of his relationship to the vendor, no doubt he bases his claim upon his own descent from the vendor or from some ancestor common to the vendor and himself. If he succeeds in establishing his descent and is found to fulfil the other conditions prescribed by the Pre-emption Act, he is entitled to a decree, the broad effect of which is that on compliance with its terms he is substituted as the purchaser in place of the original vendee. But because the right of pre-emption in such cases is based on descent, it cannot be argued that the effect of the exercise of that right is to prohibit the acquisition or holding of property by a vendee who is either not related to the vendor at all or is not related to him so nearly as the pre-emptor. No prohibition is in such a case imposed upon the vendee on account of his descent or lack of descent from any particular person. Nor does the grant of a right to one person to acquire property in preference to other persons amount to a prohibition against the acquisition or holding of property by those persons. In our judgment, therefore, S. 298 (1), Constitution Act, does not operate to render invalid a right of pre-emption based upon relationship with the vendor, and the suit was rightly decreed by the High Court. The appeal fails and is dismissed. It was heard *ex parte* against the respondents. The Advocate-General, Punjab, appeared in response to a notice under O. 36, R. 1 of the Rules of this Court. There will therefore be no order as to costs in this Court.

G.N.

*Appeal dismissed.***A. I. R. (32) 1945 Federal Court 9***(From Bombay)*

15th January 1945

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.*Wallace Brothers & Co. Ltd. —**Appellants*

v.

*Commissioner of Income-tax, Bom-
bay, Sind & Baluchistan —**Respondent.*

Case No. 55 of 1943.

(a) **Income-tax Act (1922, as amended in 1939),
S. 4A (c) (b)—Object of.**

It is not correct to say that the amendment of 1939 introduced S. 4A (c) (b) merely as a device to give the Indian Legislature a jurisdiction to tax the income of a non-resident company arising without British India which it would not otherwise possess. Section 4A (c) (b) was only a machinery provision which was adopted as a convenient mode of extending to non-resident companies a particular set of provisions contained in the Act for the calculation of their assessable income. Therefore no objection can be taken to the manner in which the provisions imposing such liability have been drafted.

[P 12 C 1]

(b) **Income-tax Act (1922), S. 4A (c) — Indian Legislature is not bound to frame its income-tax legislation on same lines and bases as have been adopted in England — It can adopt methods of taxation other than those prevailing in England.**

It may be that any particular expression used in a Parliamentary enactment relating to the constitution of a subordinate Legislature will carry the connotation which by well-established usage it has acquired in English law or politics; and it may also be that if certain powers have long been understood in England to be incidental to or associated with certain other powers, words conferring the one will be understood as carrying the other as well. But there is no justification for the proposition that the Indian Legislature must frame its income-tax legislation on the same lines or on the same bases as have been adopted or found convenient in England. The imposition and assessment of the tax must necessarily vary according to the exigencies of Public Finance in India and the methods of doing business found to prevail in India. If the conditions of today require or justify other methods of taxation there is no warrant for holding that the State in India could only adopt the methods prevailing in England.

[P 12 C 1]

(c) **Income-tax Act (1922), S. 4 — Person resident in British India — Provision taxing his foreign income is not extra-territorial.**

When a person is resident in British India any legislation which brings his foreign income into account in assessing him to income-tax will not be extra-territorial.

[P 12 C 2]

(d) **Income-tax Act (1922), S. 4A (c) (b) and 4 (1) (b) — Combined effect of — Mode in which validity of S. 4A (c) (b) should be judged — S. 4A (c) (b) and S. 4 (1) (b) are not ultra vires Indian Legislature.**

Section 4A (c) (b) is only a step towards the introduction of the measure of taxation laid down in S. 4 (1) (b) and though each of these provisions taken by itself may be unobjectionable, their com-

10 Federal Court WALLACE BROS. & CO. v. INCOME-TAX COMMR. (*Spens C. J.*) A. I. R.

bined operation is undoubtedly to assess a non-resident company to tax in respect of all its income from without British India. It is from this point of view that the validity of S. 4A (c) (b) must be judged. [P 11 C 2]

When any connexion of an individual with a particular State is shown, it creates a nexus between the State and the individual, so as to make that individual subject to the taxing power of that State. The provision in S. 4A (c) (b) that the company will be regarded as resident in British India only when its British Indian income exceeds its income arising without British India, ensures that the connexion between the assessee and the State is real and not illusory. Accordingly the provisions of S. 4A (c) (b) and S. 4 (1) (b) cannot be regarded as extra-territorial in their operation and cannot be held to be invalid on that ground : ('44) 31 A. I. R. 1944 F.C. 51, *Rel. on*; 1931 A. C. 258, *Disting.*

[P 12 C 1, 2 ; P 13 C 1]

Even if the aforesaid provisions are extra-territorial in any measure that is not a ground for holding them to be ultra vires the Indian Legislature : ('44) 31 A. I. R. 1944 F. C. 51, *Rel. on*. [P 13 C 1]

(e) Income-tax Act (1922), Ss. 4A (c) and 64 — According to S. 4A (c) question of residence must be determined with reference to each year.

According to S. 4A (c) the question of residence of an assessee must be determined with reference to each year and the finding of residence during 1938-39 would not warrant the assumption that when the proceedings for assessment were started early in 1940, the assessee was resident at the place in which he was found to have resided in 1938-39. [P 13 C 2]

(f) Income-tax Act (1922), S. 64 (3)—Objection as to place of assessment when and where to be raised.

The provisions of S. 64 (3) clearly indicate that the question as to the place of assessment is more one of administrative convenience than of jurisdiction and that in any event it is not one for adjudication by the Court. [P 14 C 1]

The scheme of the Act does not contemplate an objection as to the place of assessment being raised in appeal against the assessment after the assessment has been made. The fact that the Appellate Tribunal nevertheless thought fit to allow the question as to the place of assessment to be raised and even included it in the reference to the High Court under S. 66 of the Act cannot alter the position and the question cannot be allowed to be raised before the Federal Court in appeal against the decision of the High Court on the reference under S. 66 of the Act. [P 14 C 1]

(g) Income-tax Act (1922), Ss. 64 (1) and 4A (c) (b) — Foreign company carrying on business in partnership with firm carrying on business in British India sought to be assessed under S. 4A (c) (b)—Place of assessment.

Where a foreign company having the control and management of its affairs outside British India carries on business in partnership with a firm carrying on business in British India is sought to be assessed under S. 4A (c) (b) the assessment of the company by the Income-tax Officer for the area in which the Indian firm carries on business is right. [P 14 C 1]

(h) Income-tax Act (1922 as amended in 1939), S. 4A (c) (b)—Assessment year 1939-40—S. 4A (c) (b) as amended applies.

Section 4A (c) (b) as amended in 1939 applies to the assessment year 1939-40 though the figures have to be taken from the income for 1938-39. [P 11 C 1]

F. J. Collman, Senior Advocate, Federal Court (Nanubhai K. Desai, Advocate, Federal Court, with him) and Sir Jamshedji Kanga, Advocate, High Court, Bombay, instructed by B. Banerji, Agent — for Appellants.

M. C. Setalvad, Senior Advocate, Federal Court (G. N. Joshi, Advocate, Federal Court, with him) instructed by K. Y. Bhandarkar, Agent — for Respondent.

Spens C. J. — This is an appeal from the judgment of a Division Bench of the Bombay High Court on a reference under S. 66, Income-tax Act. The High Court granted a certificate under S. 205, Constitution Act, because the main question raised by the reference related to the validity of Ss. 4A (c) and 4 (1) (b) (ii), Income-tax Act. No objection has been taken to the maintainability of this appeal. The reference arose out of the assessment of the appellant company to income-tax for the year 1939-40, the accounting year being 1938-39. It is common ground that during the accounting year the appellant company had an income of over 17 lakhs from British India and over 7½ lakhs from without British India. Under S. 4 (1) (b), Income-tax Act, the "total income" in respect of which any person is assessable for any year is calculated in different ways according as the person is "resident in British India" or "not resident in British India." If the person is resident in British India, the total income includes not only income, profits and gains actually accrued or deemed to accrue in British India but also income accruing or arising to him without British India during the year. Residence in India for the purpose of the Act is defined in S. 4A, which is one of the sections introduced into the Income-tax Act by the legislation of 1939. Clause (a) of the section defines "residence" with reference to individuals, cl. (b) with reference to undivided families, firms and other associations of persons, and cl. (c) with reference to companies. As the appellant is a company, this is the clause relevant to the present case. It provides two tests—(1) whether the control and management of the affairs of the company is situated wholly in British India, or (2) whether its income arising in British India in the year in question exceeds its income arising without British India in that year. The appellant company does not satisfy the first test, because the control and management of its affairs is said to be in the United Kingdom. It, however, holds a 14/32 share in the firm of Messrs. Wallace and Co. carrying on business in Bombay. The other partners, as per the partnership deed of 1935, were seven individuals therein named. The income of 17 lakhs and odd derived by the appellant from British India was made up of the four following items : (1) Rs. 8,76,266, being its share in the profits of Messrs. Wal-

lace and Co.; (2) Rs. 18,197, being its share of dividends and interests received from that firm; (3) Rs. 8,59,428, dividends received from other investments in British India; and (4) Rs. 31,940, interest from other investments in British India. As this income admittedly exceeded the appellant's income from without British India (which was only about 7½ lakhs) the income-tax authorities treated the case as one falling under the second part of S. 4A (c) and as a consequence they applied S. 4 (1) (b) of the Act, with the result that tax has been assessed on the appellant's total income of over 25 lakhs.

The appellant objected to the inclusion in the assessment of its income from without British India and contended that the provisions of the Income-tax Act were ultra vires the Indian Legislature in so far as they authorised the inclusion of such income in the assessment. This is the principal question in the case and forms question 2 in the reference. The first question is nothing more than an application to the facts of the case of the answer to the second question, it does not require separate discussion. Question 3 in the reference has no substance and it was admitted before us that the amended provision was applicable to the assessment in question, because 1939-40 was the assessment year though the figures have to be taken from the income for 1938-39. One other question in the reference, question 4, raises a question of procedure, to which it will be convenient to refer later. Before the High Court and in the grounds of appeal to this Court, a grievance seems to have been made that certain other questions should also have been raised, so as to bring out clearly the points in dispute between the parties. During the arguments before us, it was conceded by counsel for the appellant that all that he desired to put forward on behalf of the appellant could be urged on the basis of the questions as they now stand. It is therefore unnecessary to refer further to this complaint.

Relying on some of the decisions interpreting the word "residence" in the English Income-tax Act, counsel for the appellant contended that the second of the tests adopted in S. 4-A (c), Indian Income-tax Act, was wholly artificial and unwarranted by established principles and that it had been so framed only as a device to give the Indian Legislature a jurisdiction which it would not otherwise possess. The appellant company, it was said, did not "reside" here in any of the known senses of the term, and as its income from without British India did not ex hypothesi accrue here and it was not brought here, it was urged that it was beyond the power of the Indian Legislature to impose a tax on

that income. It was argued that the Legislature could only tax persons resident here or income accrued, due or received here, and that any attempt to go further would make the Act illegally extra-territorial in its operation. It was contended on behalf of the respondent that even according to the English decisions, the definition of "residence" in respect of a company was to a certain extent artificial and that it was open to the Legislature to adopt whatever definition it thought fit. If the matter had stood on S. 4A (c) alone, this would undoubtedly be so. But S. 4A (c) is only a step towards the introduction of the measure of taxation laid down in S. 4 (1) (b) and though each of these provisions taken by itself may be unobjectionable, their combined operation is undoubtedly to assess the appellant to tax in respect of all its income from without British India. Counsel for the respondent conceded that it is from this point of view that the validity of the provision must be judged. But he maintained that even on this basis the objection to the validity of the law was untenable—(1) because the impugned provisions were not really extra-territorial in their operation, and (2) because the extra-territorial operation, even if there was any, was no ground for the invalidation of the provisions.

We agree with the respondent's contention that the mere fact that the Indian Legislature has adopted a test of "residence" different from that obtaining in England is not by itself of much consequence. The course of decisions in England has attempted to give effect to what was conceived to be the policy of the English Income-tax law, in the light of the changing conditions and methods of carrying on business there. These decisions were partly based upon certain clauses in the English Act which limited the significance of the word "residence" in that Act, and gave some guide in considering whether a person did or did not come within the words "residing in the United Kingdom": *vide* (1875) 10 Ex. 20¹ at p. 32. Reference has no doubt been made now and then to grounds on which that system of taxation could be justified, as for instance, when it was said that a person resident in England or carrying on business in England enjoyed the benefit of the security and protection afforded to him by the State in England and that it was therefore not unreasonable to bring even his foreign income into account in assessing him to income-tax. But considerations like these cannot be erected into a rule of law limiting the taxing power of the State to those particular cases.

We cannot accede to the argument that the
1. (1875) 10 Ex. 20, *Attorney-General v. Alexander*.

amendment of the Indian Income-tax Act in 1939 introduced the test now in question merely as a device to give the Indian Legislature a jurisdiction which it would not otherwise possess. It was only a machinery provision which was adopted as a convenient mode of extending to this class of assessee a particular set of provisions contained in the Act for the calculation of their assessable income. The objection, if any, must be to the imposition of the liability itself and not to the manner in which the provisions imposing such liability have been drafted.

Relying upon certain observations in 1933 A. C. 156² counsel for the appellant contended that the powers conferred on the Indian Legislature by the Constitution Act must be interpreted in the light of the prevailing "legislative practice" in England. It may be that any particular expression used in a Parliamentary enactment relating to the constitution of a subordinate legislature will carry the connotation which by well-established usage it has acquired in English law or politics; and it may also be that if certain powers have long been understood in England to be incidental to or associated with certain other powers, words conferring the one will be understood as carrying the other as well. But we cannot interpret the observations in 1933 A. C. 156² as implying that the Indian Legislature must frame its income-tax legislation on the same lines or on the same bases as have been adopted or found convenient in England. The imposition and assessment of the tax must necessarily vary according to the exigencies of Public Finance here and the methods of doing business found to prevail in this country. Even as regards persons resident in this country, the Indian Legislature did not, till very recently, think it worthwhile or find it necessary to take their income from without British India into account, in assessing them to income-tax, except to the extent to which such income had been brought into this country. If the conditions of today require or justify other methods of taxation, we see no warrant for holding that the State here could only adopt the methods prevailing in England.

As regards the contention that the impugned provisions are extra-territorial in their operation and accordingly beyond the powers of the Indian Legislature, we are of the opinion that taking the scheme as a whole they are not in their operation extra-territorial in the strict legal sense of that term. The Legislature has not attempted to regulate, punish or directly deal with any act done beyond the territorial limits of British India nor does it seek to

impose a liability on property situate outside its jurisdiction. It was conceded on behalf of the appellant that when a person is resident in British India any legislation which brings his foreign income into account in assessing him to income-tax will not be extra-territorial. This illustration establishes (1) that the mere fact of the accrual of the income abroad is not conclusive, and (2) that when the cases refer in justification of such taxation, to the protection which a person enjoys by his residence in a particular country, the benefit of that protection is not limited to the income accrued or received in that country. Where the connexion of the assessee with a particular country is not founded upon residence but arises out of business operations, it may be a question of degree whether the connexion is slender or intimate, but it can nonetheless be as factual a connexion as a connexion based on residence. Many systems of law have enacted that if a person resides in a country for six months, he must be deemed to be "resident" there for purposes of income-tax though during the rest of the year he might have resided elsewhere. A person who receives a substantial business income from a country may well be regarded as receiving the protection of its laws and administration in the same degree as a person who resides there or carries on business there; and if a person resident in a country for six months can be taxed even in respect of his foreign income earned, it may be, during the remaining six months, it is difficult to see anything inherently objectionable in adopting the same basis when a person derives more than half his total income from business in a particular country. It is the person who is subjected to taxation in either case and his connexion with the taxing country is as substantial in the one case as in the other, to warrant both cases being treated alike.

Decisions of the English Courts afford little guidance on this question, in view of the difference in the scheme of taxation between the two countries. But some of the Australian decisions to which reference has been made in the judgment of this Court in 1944 F.C.R. 229³ afford some guidance. The facts in 1944 F.C.R. 229³ were no doubt different and the decision was based on the ground that the source of the income there was British Indian. But this Court there adopted the principle laid down in the Australian decisions that once "any connexion" with a particular State is shown, it creates a nexus between the State and the individual, so as to make that individual subject to the taxing power of that State. The

2. ('33) 20 A. I. R. 1933 P. C. 16 : 1933 A. C. 156 (P.C.), *Croft v. Dunphy*.

3. ('44) 31 A. I. R. 1944 F. C. 51 : 1944-6 F. C. R. 229 : 214 I. C. 244 (F. C.), *Governor-General in Council v. The Raleigh Investment Co., Ltd.*

provision in the impugned clause that the company will be regarded as resident in British India only when its British Indian income exceeds its income arising without British India, ensures that the connexion between the assessee and the State is real and not illusory. Observations like those in 1931 A. C. 258⁴ at p. 268 do not bear upon the present case, because, on a construction of the relevant statute, their Lordships there found that the fact on which territorial jurisdiction was founded by that statute was not the personal residence of the tax-payer but the "local situation of the source of income." We are accordingly of the opinion that the impugned provisions of the Income-tax Act cannot be held to be extra-territorial in their operation.

The second contention urged on behalf of the respondent that even if these provisions are in any measure extra-territorial in their effect, that is not a ground for holding them to be ultra vires the Indian Legislature is supported by the decision of this Court in 1944 F. C. R. 229.³ We have nothing to add to the reasons there set out in support of that conclusion. Question 4 in the reference raises a question of procedure, viz., the jurisdiction of the particular officer to assess the appellant. Section 64 of the Act provides that where an assessee carries on a business at any place he shall be assessed by the Income-tax Officer of the area in which that place is situated and that in all other cases an assessee shall be assessed by the Income-tax Officer of the area in which he resides. The High Court thought that the answer to question 4 was plain. "The assessee" it said

"has been found to be a partner in the firm of Wallace and Company and the assessment was made by the Income-tax Officer for the area in which Wallace and Company carry on business."

As the point has been pressed before us, it is necessary to deal with it in some more detail. The following are the facts material to this question. On 29th January 1940, Wallace and Company acting on behalf of Wallace Brothers and Co., Ltd., filed the usual return of income, (page 50 of the paper-book). This was drawn up in accordance with the pre-existing practice. But as S. 4A (c) had come into operation by that time, the Income-tax Officer, Companies Circle, by letter dated 7th February 1940, called for a statement of the total income of Wallace Brothers and Co., Ltd.:

"to enable me to determine whether the company is resident or non-resident as per S. 4A (c), Income-tax Amendment Act, 1939, (page 53 of the paper-book)."

By letter dated 20th February 1940, Wallace and Company took exception to this view and stated that they had no copy of the profit and

loss account of Wallace Brothers and Co., Ltd.; when the Income-tax Officer insisted on having the information, they re-submitted the return of Wallace Brothers and Co., Ltd., reiterating their contention as to the non-liability of the income arising outside British India of Wallace Brothers and Co., Ltd., but they added,

"to comply with your request we enclose copy of the balance-sheet and profit and loss account of Wallace Brothers and Co., Ltd., for the year ended 31st July 1938, but we do so under protest and without admitting in any way a liability to taxation on the world income, (p. 56 of the paper-book.)"

It is on the materials thus furnished that one Mr. Singh who was then Additional Income-tax Officer, Companies Circle, made the assessment order dated 12th February 1941, (p. 15 of the paper-book). The assessee is there shown as Wallace Brothers and Co., Ltd., through Messrs. Wallace and Company, 9, Wallace Street, Bombay, and it is treated as a "resident company." Against this order, there was an appeal to the Appellate Assistant Commissioner signed by Wallace and Company as agents, under S. 43, of Wallace Brothers and Co., Ltd., (p. 23), and as that officer confirmed the assessment, there was a further appeal to the Appellate Tribunal. The objection of non-compliance with S. 64 was for the first time raised before the Appellate Tribunal, (see p. 27). That Tribunal was of the opinion that the assessment was in conformity with both cls. (1) and (2) of S. 64, because the assessee company was carrying on business in Bombay as a partner in Messrs. Wallace and Company and was also by reason of S. 4A (c) deemed to be resident in Bombay. As regards the ground of residence in Bombay, counsel for the appellant rightly pointed out that according to S. 4A (c) the question of residence must be determined with reference to each year and that the finding of residence during 1938-39 would not warrant the assumption that when the proceedings for assessment were started early in 1940, the appellant company was resident in Bombay. If this question becomes material, it may be necessary to ascertain whether in 1940 the appellant company could be deemed to have been resident in Bombay with reference to the conditions required by S. 4A (c).

It however seems to us open to serious doubt whether the appellant is entitled to raise this question at all and whether it is really a matter for decision by the Court. Clause (3) of S. 64 provides that any question as to the place of assessment shall be determined by the Commissioner or by the Central Board of Revenue. Proviso 3 to the clause enacts that if the place of assessment is called in question by the assessee, the Income-tax

4. (1931) 1931 A. C. 258, Commissioner of Taxes v. Union Trustee Company of Australia.

Officer shall, if not satisfied with the correctness of the claim, refer the matter for determination under this sub-section before assessment is made. These provisions clearly indicate that the matter is more one of administrative convenience than of jurisdiction and that in any event it is not one for adjudication by the Court. Proviso 2 to cl. (3) further enacts that the place of assessment shall not be called in question by an assessee if he has made a return in response to the notice under sub-s. (1) of S. 22, or if he has not made such a return, it shall not be called in question after the expiry of the time allowed by the notice for the making of a return. This confirms us in the view that the scheme of the Act does not contemplate an objection as to the place of assessment being raised on an appeal against the assessment after the assessment has been made. As we have already pointed out, the objection was not raised in the present case even before the Appellate Income-tax Officer but only before the Appellate Tribunal. The fact that the Tribunal nevertheless thought fit to allow the question to be raised and even included it in the reference to the High Court cannot alter the legal position.

We however proceed to deal with the objection on its merits. Counsel for the respondent alternatively sought to bring the case under cl. (5) of S. 64 and for this purpose he wished to refer to an order of the Commissioner of Income-tax assigning this particular assessment case to that particular officer. Counsel for the appellant objected to this document being used at this stage as it was not relied on before the High Court or before the Appellate Tribunal. The whole procedure as to the raising of this objection has been irregular but we prefer to leave that document alone. We concur in the view taken by the High Court that the appellant company has been carrying on business in Bombay and that the assessment was therefore rightly made under cl. (1) of S. 64. Clause (1), Partnership Deed, relating to Wallace and Company provides that Wallace Brothers and Co., Ltd., and seven other gentlemen therein named shall carry on business in partnership as merchants and commission agents at Bombay. The deed reserves extensive powers to Wallace Brothers and Co., Ltd., in respect of the business. Nothing has been adduced to show that in spite of these recitals and these powers, Wallace Brothers and Co., Ltd., as one of the partners cannot be regarded as carrying on the business. The appellant stated that it was only a sleeping partner and this is repeated in the reference as well as in the judgment of the High Court. With refer-

ence to this statement counsel for the appellant drew our attention to certain observations of Lord Parker in (1915) A.C. 1022⁵ at p. 1037. They were made by way of explanation of the decision in (1889) 14 A. C. 493⁶ and they would only show that the appellant company, if it was only a sleeping partner in Wallace and Company of Bombay, could not be regarded as carrying on that business in the United Kingdom. The appeal fails and is dismissed with costs. Leave to appeal to His Majesty in Council granted.

G.N.

Appeal dismissed.

5. (1915) 1915 A. C. 1022, Mitchell v. Egyptian Hotels Ltd.

6. (1889) 14 A. C. 493, John Carter Colquhoun v. Henry Brooks.

A. I. R. (32) 1945 Federal Court 14*(From Calcutta)*

13th December 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.*M. L. Bannerjee and another*
Appellants

v.

Emperor.

Criminal Appeals Nos. 8 and 9 of 1944.

Criminal P. C. (1898), S. 197 — Expression
“some higher authority” in S. 197—Meaning of.

The expression “some higher authority” in S. 197 cannot be construed as meaning any officer of the Central Government. Having regard to the juxtaposition in which the expression occurs in S. 197 and the history of the enactment the expression has reference to the Central Government, the Governor-General and the Secretary of State. “G. H. Q.” (whatever that expression might signify) is not an authority higher than a Provincial Government within the meaning of S. 197. [P 15 C 1, 2]

J. P. Mitra, Senior Advocate, Federal Court,
(S. N. Mukerjee, Advocate, Federal Court,
with him) instructed by Ganpat Rai, Agent
(in 8) and Sardar Raghbir Singh, Advocate,
Federal Court, instructed by Ranjit Singh
Narula, Agent, (in 9) — for Appellants.

Sir B. L. Mitter, Senior Advocate, Federal
Court, (K. K. Raizada, Advocate, Federal
Court, with him) instructed by B. Banerji,
Agent (in both) — for the Crown.

Spens C. J. — These two appeals may be disposed of together. The appellant in Criminal Appeal No. 8 of 1944, Bannerjee, was in December 1942 officiating Goods and Yard Supervisor at Sealdah, which is the Calcutta terminus of the Bengal Assam—Railway, and the appellant in Criminal Appeal No. 9 of 1944, Bhattacharjee, was at that time Shed Inspector at Sealdah. Bannerjee was then holding an Emergency Commission as a Second Lieutenant and Bhattacharjee had been made a Warrant Officer. They were charged under S. 161 read with S. 34, Penal Code, with having received

from Dud Nath Pandey (P. W. 2) on 31st December 1942, the sum of Rs. 250 as a motive or reward for allotting to the firm on whose behalf Pandey represented himself to be acting, a wagon for the transportation of bales of cloth from Sealdah to Kisenganj. They were convicted by the Additional District Magistrate, 24 Purganas, and each of them was sentenced to undergo one year's rigorous imprisonment and to pay a fine of Rs. 500 and in default of payment of fine to suffer further rigorous imprisonment for three months. Their appeals to the Sessions Judge, 24 Purganas, and their revision application to the Calcutta High Court were dismissed. From the judgment of the High Court these appeals were preferred, supported by the usual certificate under S. 205, Constitution Act.

The constitutional question raised on behalf of the appellants before the High Court under S. 270 (1), Constitution Act, was not sought to be reagitated before us. It was conceded that it was concluded by the judgment of this Court in 1944 F. C. R. 262.¹ Some attempt, similar to that in 1943 F. C. R. 7,² was made to raise a constitutional point on the construction of Ss. 240 and 241 in order to support an argument really based on S. 197, Criminal P. C., that the cases must fail for lack of the necessary sanction under that section, inasmuch as the appellants were public servants who were not removable from their office save by or with the sanction of an authority higher than a Provincial Government, and the offence with which they were charged was alleged to have been committed by them while acting or purporting to act in the discharge of their official duty.

The appellants have in our judgment failed to establish that they were public servants who could be removed from their office only by some authority higher than a Provincial Government. The only evidence on the record on that point is a statement by P. W. 4, Mozumdar, who is a District Traffic Superintendent on the Bengal-Assam Railway, to the effect that the Goods Supervisor and the Shed Inspector are subordinate to the Chief Transportation Manager and the Chief Commercial Manager who can jointly dismiss them. It was suggested that these officers, being officers of the Central Government, were "an authority higher than a Provincial Government." We are unable to accept this suggestion. To construe this expression as meaning any

officer of the Central Government would lead to the patent absurdities. Having regard to the juxtaposition in which this expression occurs in S. 197, Criminal P. C., and the history of the enactment, we consider that the expression has reference to the Central Government, the Governor-General and the Secretary of State.

It was contended on behalf of Bannerjee that he had been given a Commission as Second Lieutenant by virtue of his position as a Goods and Yard Supervisor and that as he could be deprived of his Commission only by G. H. Q. he could not be removed from his office of Goods and Yard Supervisor except with the sanction of G. H. Q. which was an authority higher than a Provincial Government. Beyond the fact that in December 1942, Bannerjee held an Emergency Commission as a Second Lieutenant there is not a word on the record to indicate that he could not be dismissed from his office of Goods Supervisor without the sanction of G. H. Q. Nor are we inclined to accept the proposition that "G. H. Q." (whatever that expression might signify) is an authority higher than a Provincial Government within the meaning of S. 197, Criminal P. C. A similar contention was sought to be raised before us on behalf of Bhattacharjee, but counsel realising that his case could not in this respect stand on any higher footing than that of Bannerjee, did not press the point. That may also be the reason why this point was not taken on his behalf before the High Court.

In our judgment it has not been established that the appellants are within the class of public servants to whom the provisions of S. 197, Criminal P. C., would be applicable. In this view of the matter, it is unnecessary to determine whether the offence with which they were charged was or was not alleged to have been committed by them while acting or purporting to act in the discharge of their official duty. We were, with our leave, also addressed on behalf of the appellants on the merits, but nothing that was urged before us served to raise any doubt in our minds with regard to the correctness of the findings of the Courts below. The evidence clearly establishes the guilt of the appellants beyond any reasonable doubt and the sentences are, in our judgment, appropriate. These appeals are dismissed.

G.N.

Appeals dismissed.

1. ('44) 31 A.I.R. 1944 F. C. 66: 23 Pat. 517: 1944-6 F.C.R. 262: 214 I. C. 199 (F.C.), Hector Thomas Huntley v. Emperor.

2. ('43) 30 A. I. R. 1943 F. C. 18 : 22 Pat. 349 : I.L.R. (1943) Kar. F. C. 2: 1943-5 F. C. R. 7 : 206 I. C. 232 (F.C.), Afzalur Rehman's Case.

A. I. R. (32) 1945 Federal Court 16*(From Calcutta)*

19th January 1945

SPENS C. J., VARADACHARIAR AND
ZAFRULLAH KHAN JJ.*Basdeo Agarwalla — Appellant*

v.

Emperor.

Criminal Appeal No. 16 of 1944.

(a) Drugs Control Order (1943), Cl. 16—Sanction purporting to be given by Provincial Government is valid.

Where special statutory powers are conferred and specific provision is made in the statute as to the manner in which the powers are to be exercised, they should be exercised by the authority and in the manner specified in the statute and in strict conformity with the provisions thereof. The provisions of Cl. 16 expressly authorise the previous sanction of the Provincial Government, and therefore, a sanction under Cl. 16 purporting to have been given by the Provincial Government would be valid and no objection can be taken to the form of the sanction. It need not be expressed in the name of the Governor.

[P 17 C 1]

(b) Drugs Control Order (1943), Cl. 16—Object of — Prosecution instituted without previous sanction is completely null and void—New proceedings should be commenced ab initio if sanction is subsequently given—Failure to start new proceedings—Effect of.

The absence of sanction under Cl. 16 prior to the institution of the prosecution cannot be regarded as a mere technical defect. Clause 16 was obviously enacted for the purpose of protecting the citizen, and in order to give the Provincial Government in every case a proper opportunity of considering whether a prosecution should in the circumstances of each particular case be instituted at all. Such a clause, even when it may appear that a technical offence has been committed, enables the Provincial Government, if in a particular case it so thinks fit, to forbid any prosecution. The sanction is not intended to be and should not be an automatic formality and should not so be regarded either by police or officials

[P 17 C 2]

The words of Cl. 16 are plain and imperative and it is essential that the provisions should be observed with complete strictness and where prosecutions have been initiated without the requisite sanction, they should be regarded as completely null and void, and if sanction is subsequently given, new proceedings should be commenced ab initio.

[P 18 C 1]

The accused was produced before the Chief Presidency Magistrate on 2nd May 1944 for contravening the Drugs Control Order and a challan under Rr. 81 (4) and 121, Defence of India Rules, filed on that day. Thereupon, the Chief Presidency Magistrate made an order transferring the case to another Magistrate. Later on the same day the accused was brought before that Magistrate who adjourned the case to 16th May 1944, for evidence and made an order directing that the accused should give bail in Rs. 200 to appear on 16th May. On 16th May it was noted on the order sheet that sanction under Cl. 16 had not been received. None the less the Magistrate made further orders directing that the case be adjourned to 24th May for evidence, that the prosecution witnesses be summoned for that day and for bail as before. On 24th May the sanction

was filed. Three prosecution witnesses were examined and a further adjournment ordered. Thereafter the case proceeded in the usual way up to conviction and sentence:

Held that the prosecution was clearly instituted without the previous sanction required by Cl. 16 and as it was not possible to sever the proceedings prior to 24th May from those occurring on and after that date and as when the sanction was obtained, no new start was made, the whole proceedings were null and void.

[P 18 C 1]

Mahabir Prasad, Senior Advocate, Federal Court (Samarendra Nath Mukherjee and R. J. Bahadur, Advocates, Federal Court, with him), instructed by N. R. Bose, Agent — for Appellant.

Sir B. L. Mitter, Senior Advocate, Federal Court (H. K. Bose, Advocate, Federal Court, with him), instructed by B. Banerji, Agent — for the Crown.

Spens C. J. — The appellant in this case was charged with two offences alleged to have been committed on 20th April 1944, contravening the provisions of cls. 9 (a) and 13 (d), Drugs Control Order, 1943. He was convicted on 29th June 1944, and sentenced to a term of four months' rigorous imprisonment and a fine of Rs. 1000, or in default to a further term of four months' rigorous imprisonment. Against this conviction he appealed to the High Court of Judicature at Fort William in Bengal, and on 13th November 1944, his appeal was dismissed, although the sentence of imprisonment was reduced from four months to one month. A certificate under S. 205, Government of India Act, 1935, was granted and hence the appeal to this Court. The Drugs Control Order, 1943, provides by Cl. 16 as follows:

"No prosecution for any contravention of the provisions of this Order shall be instituted without the previous sanction of the Provincial Government. . . ."

In purported compliance with the provisions of Cl. 16, the Provincial Government of Bengal made an order sanctioning the prosecution of the appellant by a document dated 28rd May 1944, in the following terms:

"Whereas it appears from a report of the Deputy Commissioner of Police, Enforcement Department Calcutta that Basudev Agarwalla, son of Anandaram Agarwalla, . . . of 185 Harrison Road, Calcutta, c/o Messrs. Umashankar & Co. Ltd., sold on 20th April 1944, 6 x 1 c.c. ampoules of Emetine Hydrochloride containing 1 gr. each to Babu H. N. Roy, Sub-Inspector of Excise employed on drugs control work for Rs. 13 in contravention of Cl. 9, Drugs Control Order 1943, the Provincial Government, in exercise of the power conferred by Cl. 16 of the said Order sanction the prosecution of the aforesaid Basudev Agarwalla under sub-r. (4) of R. 81, Defence of India Rules.

(Sd.) S. BANERJEE.

Secretary to Government of Bengal."

It was argued before us that the sanction in the above form did not comply with the provisions of Ss. 49 and 59, Government of India Act, 1935. It was suggested that under

those sections the sanction must be expressed to be given by the Governor and that it was improper that the Provincial Government should have purported to sanction the prosecution. This argument was apparently based on what were assumed to have been the views of the majority of this Court in (1944) F. C. R. 1.¹ But as pointed out in that case, where special statutory powers are conferred and specific provision is made in the statute as to the manner in which the powers are to be exercised, they should be exercised by the authority and in the manner specified in the statute and in strict conformity with the provisions thereof. In this case the provisions of Cl. 16 expressly authorise the previous sanction of the Provincial Government, and accordingly in our judgment no valid objection can be taken to the form of the sanction purported to be given in this case.

It was then argued that on the facts of this case the prosecution had been instituted prior to the giving of the sanction in question and that accordingly having regard to the very definite provisions of cl. 16 the proceedings and conviction must be null and void. From the order sheet of the Chief Presidency Magistrate's Record, it appears that the appellant was produced before the Chief Presidency Magistrate on 2nd May 1944; and a challan under Rr. 81 (4) and 121, Defence of India Rules, filed on that day. Thereupon the Chief Presidency Magistrate made an order transferring the case to another Magistrate. Later, on the same day, the appellant was brought before that Magistrate who adjourned the case to 16th May 1944, for evidence and made an order directing that the appellant should give bail in Rs. 200 to appear on 16th May. On 16th May it was noted on the order sheet that sanction had not been received. None the less the Magistrate made further orders directing that the case be adjourned to 24th May for evidence, that the prosecution witnesses be summoned for that day and for bail as before. Against the entry of 24th May 1944, a note appears in the margin of the record "sanction filed" and the entry proceeds to record that three prosecution witnesses were examined and a further adjournment ordered. Thereafter the case is recorded as proceeding in the usual way up to conviction and sentence on 29th June 1944. From this it is clear that the sanction was not filed until 24th May 1944, but that in the meantime from 2nd May onwards, the prosecution had been put in motion and various steps taken by the Magistrates. It would appear that when the absence of sanc-

tion was noted, it was considered to be a matter of little importance, which it could be assumed would be put right in due course, and which should not interrupt the ordinary course of a prosecution.

In the High Court also it appears to have been considered that this point raised little more than a mere technical objection and that, as the more material part of the prosecution proceedings did not take place until after the sanction had been received, it was possible to ignore the fact that the proceedings had been instituted without such a sanction. In this Court too we were asked to treat the matter on much the same lines, being invited to hold that whilst, no doubt, all that had been done in the matter prior to the 24th May was without jurisdiction that could be severed from the subsequent proceedings and the latter be regarded as separate and fresh proceedings properly sanctioned. In this connexion we were also referred to Ss. 196 and 197, Criminal P. C., and cases decided in connexion with such sections. But having regard to the difference in the wording of the sections in question as compared with the wording of cl. 16, Drugs Control Order, 1943, we were unable to get any material assistance from such cases.

In our view, the absence of sanction prior to the institution of the prosecution cannot be regarded as a mere technical defect. The clause in question was obviously enacted for the purpose of protecting the citizen, and in order to give the Provincial Government in every case a proper opportunity of considering whether a prosecution should in the circumstances of each particular case be instituted at all. Such a clause, even when it may appear that a technical offence has been committed, enables the Provincial Government, if in a particular case it so thinks fit, to forbid any prosecution. The sanction is not intended to be and should not be an automatic formality and should not so be regarded either by police or officials. There may well be technical offences committed against the provisions of such an Order as that in question, in which the Provincial Government might have excellent reason for considering a prosecution undesirable or inexpedient. But this decision must be made before a prosecution is started. A sanction after a prosecution has been started is a very different thing. The fact that a citizen is brought into Court and charged with an offence may very seriously affect his reputation and a subsequent refusal of sanction to a prosecution cannot possibly undo the harm which may have been done by the initiation of the first stages of a prosecution. Moreover in our judgment the official by

1. (1943) 30 A.I.R. 1943 F. C. 75: I.L.R. (1943) Kar. F. C. 103: 1944-6 F. C. R. 1: 211 I. C. 241 (F.C.), Emperor v. Sibnath Banerjee.

whom or on whose advice a sanction is given or refused may well take a different view if he considers the matter prior to any step being taken to that which he may take if he is asked to sanction a prosecution which has in fact already been started.

In our judgment the words of cl. 16 of this Order are plain and imperative, and it is essential that the provisions should be observed with complete strictness and where prosecutions have been initiated without the requisite sanction, that they should be regarded as completely null and void, and if sanction is subsequently given, that new proceedings should be commenced ab initio. Only so can the protection intended for the citizen be assured. In our judgment the prosecution in this case was clearly instituted without the previous sanction required by cl. 16, and it is not possible to sever the proceedings prior to 24th May from those occurring on and after this date. Consequently, as, when the sanction was obtained, no new start was made, the whole proceedings in this case are null and void. The appeal must accordingly be allowed and we direct the case to be remitted to the High Court, and declare that in place of the conviction recorded against the appellant an order shall be made quashing all the proceedings for want of jurisdiction. The appellant will be released from his bail and the fine if paid will be refunded.

G.N.

*Appeal allowed.***A. I. R. (32) 1945 Federal Court 18**

(From Patna : ('45) 32 A. I. R. 1945 Pat. 44).

19th January 1945

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.

Basanta Chandra Ghose — Appellant
v.

Emperor.

Criminal Appeal No. 12 of 1944.

(a) Restriction and Detention Ordinance (3 of 1944) — Ordinance is not ultra vires Governor-General.

The reference to "the efficient prosecution of the war" in the Ordinance as well as in the order of detention must be understood in the light of the circumstances in which the Ordinance came to be passed and since the efficient prosecution of the war was necessary for the defence of India Ordinance 3 of 1944 is not ultra vires the Governor-General in so far as it purported to authorise detention on the ground that the detenu was likely to act in a manner prejudicial to the efficient prosecution of the war. [P 19 C 1, 2]

(b) Defence of India Rules (1939), R. 26 — Burden of proof is on detenu to show that order was fraudulent exercise.

It is no doubt open to the detenu to show that the order was not in fact made by the Governor of the Province or that it was a fraudulent exercise of

the power but the burden of substantiating these pleas lies on the detenu : (1942) A. C. 206 and (1942) A. C. 284, *Rel. on.* [P 20 C 1]

The mere fact that the detenu challenged the factum or the bona fides of the order or the fact that the officers of Government must naturally be in possession of information on the subject cannot be said to be "proof to the contrary" so as to make it incumbent on the Government to adduce evidence in support of the order. [P 19 C 2; P 20 C 1]

(c) Defence of India Rules (1939), R. 26 — Earlier order defective only on formal grounds — Proper order can be passed on pre-existing grounds.

Where the earlier order of detention is held defective merely on formal grounds there is nothing to preclude a proper order of detention being based on the pre-existing grounds themselves, especially in cases in which the sufficiency of the grounds is not examinable by the Court. Order of detention can be passed against a person who is already under detention : (1942) 2 K. B. 14, *Rel. on.* ; ('44) 31 A. I. R. 1944 Pat. 354, *Disting.* [P 20 C 2; P 21 C 1]

(d) Criminal P. C. (1898), S. 491 — Before directing release, valid order of detention passed — Detenu cannot be released.

The analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings cannot be invoked in habeas corpus proceedings. If at any time before the Court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the petitioner. [P 21 C 1]

S. C. Ghose, Advocate, Federal Court, with B. C. De, Advocate, Patna High Court, instructed by Gurudayal Sahay, Agent — for Appellant.

Sir Brojendra Mitter, Advocate-General of India (H. K. Bose, Advocate, Federal Court, with him) instructed by K. Y. Bhandarkar, Agent, Mahabir Prasad, Advocate-General of Bihar, (R. J. Bahadur, Advocate, Federal Court, with him) instructed by S. P. Varma, Agent — for the Crown.

Spens C. J. — This is an appeal by a detenu against an order of the High Court at Patna dismissing his application under S. 491, Criminal P. C. The appellant was arrested on 27th March 1942, under an order dated 19th March 1942, purporting to be made by the Governor of Bihar in exercise of the powers conferred by R. 26, Defence of India Rules. The application under S. 491 was filed on 28th April 1943. For one reason or another the hearing of the application was delayed till February 1944, and in the meanwhile, Ordinance 3 of 1944 was promulgated on 15th January 1944. The application was dismissed by the High Court, but, on appeal, this Court held that the new Ordinance (Ordinance 3 of 1944) did not take away the power of the High Court to deal with the matter and accordingly remitted the case to the High Court with a direction that the petition be restored to the file and disposed of in due course of law. The

order of this Court was passed on 23rd May 1944.¹ On 3rd July 1944, the Governor of Bihar passed two orders, Nos. 3928C and 3929C. By the first, he cancelled the order of detention dated 19th March 1942, and by the second, he directed the detention of the appellant on the ground that it was necessary so to do "with a view to preventing him from acting in a manner prejudicial to the maintenance of public order and the efficient prosecution of the war." When the application again came on for hearing before the High Court, reliance was placed by the Advocate-General of Bihar on the order of 3rd July 1944, and he contended that it was unnecessary in the circumstances to enquire into the validity of the order of 19th March 1942. Objection was taken on behalf of the detenu to this course and the validity of the orders of 19th March 1942, and 3rd July 1944, was questioned on various grounds. These contentions were discussed at considerable length by the learned Judges of the High Court and they held that the objections were untenable; the petition was accordingly dismissed. Hence this appeal.

Two constitutional points were urged before us. The first was to the effect that Ordinance 3 of 1944 was ultra vires the Governor-General in so far as it purported to authorise detention on the ground that the detenu was likely to act in a manner prejudicial to the efficient prosecution of the war. It was contended that legislation relating to the prosecution of war was not within the ambit of any of the lists in Sch. 7 to the Constitution Act and that therefore neither the Indian Legislature nor the ordinance-making authority was competent to legislate in respect of that topic. It was recognised that "preventive detention for reasons of State connected with defence" was a subject specified in entry No. 1 in List I but it was urged that it could not be assumed that the prosecution of the war was necessarily a matter of defence and that the war may in certain circumstances be a war of aggression or conquest. We are of the opinion that there is no force in this contention. The reference to "the efficient prosecution of the war" in the Ordinance as well as in the order of detention must be understood in the light of the circumstances in which the Ordinance came to be passed. The language of cl. 3 of the Ordinance is only a repetition of the language of S. 2 (i), Defence of India Act, and that Act begins by referring to the proclamation of the Governor-General under S. 102, Constitution Act, to the effect that the security of India is threatened by the war. Events of which the Court

is entitled to take judicial notice were happening in 1942, 1943 and 1944 with reference to which it could clearly be postulated that the efficient prosecution of the war was necessary for the defence of India.

It was next contended that cl. 11 of the Ordinance was invalid in so far as it precluded certain matters being adduced in evidence. It was said that this was in effect an attempt to repeal pro tanto certain provisions of the Evidence Act and it was not within the power of the Governor-General to do so by an Ordinance. This contention is misconceived. It was admitted that it was within the power of the Governor-General to enact such a provision to be in force during the time that the Ordinance itself was in force. What was contended was that he had no power to affect the provisions of the Evidence Act permanently. Clause 11 of the Ordinance does not purport to do so. Its words are general. The utmost that could be said is that if the prohibition enacted by it were sought to be enforced after the expiry of the Ordinance, a question might arise as to whether the prohibition would then remain in force. But that is no ground for holding that the clause is invalid even in so far as it prohibits certain things being done during the currency of the Ordinance. Objection was also taken to the validity of sub-cl. (2) of cl. 11. It was contended on the authority in (1920) 1 K. B. 829² that such a provision could not be said to be for the peace and good government of British India and could not therefore be held to be authorised by S. 72, Sch. 9, Constitution Act. It is unnecessary for the decision of this case to deal with this question even if it were open to the Court to examine the correctness of the decision of the Governor-General as to the requirements of any particular situation.

With the leave of the Court, a number of contentions relating to other aspects of the case were urged before us. As we are of the opinion that there is no substance in any of these contentions, they may be briefly dealt with. It was broadly maintained that neither the order of 19th March 1942 nor the order of 3rd July 1944 was a bona fide exercise of the power entrusted to the Governor and that they were passed for other ulterior ends unconnected with the maintenance of public order or the efficient prosecution of the war. It was urged that as the detenu challenged the bona fides of the order and as the reasons and circumstances relating thereto were wholly within the knowledge of the officers of Government, it was incumbent upon the Crown to examine these officers to establish the bona fide character of the order and that as they

1. Reported in (44) 31 A. I. R. 1944 F. C. 86 : 23 Pat. 678 : 1944-6 F. C. R. 295 (F. C.), Basanta Chandra v. Emperor.

2. (1920) 1 K. B. 829, Chester v. Bateson.

have not been examined the Court must draw the inference that the order was not made in the bona fide exercise of the power. It was even contended that after the proclamation under S. 93, Constitution Act, the Crown was no longer entitled to rely on S. 59 (2) of that Act and cl. 10 (3) of Ordinance 3 of 1944 and that the order of 3rd July 1944 should therefore be formally proved. A complaint was also made that the High Court acted improperly in dismissing the application of the detenu to summon Mr. Houlton, the Chief Secretary to the Government of Bihar, who had signed the orders of 3rd July 1944. This line of argument is, in our opinion, untenable. It was no doubt open to the detenu to show that the order was not in fact made by the Governor of Bihar or that it was a fraudulent exercise of the power. The observations in (1942) A. C. 206³ and (1942) A. C. 284⁴ establish that the burden of substantiating these pleas lies on the detenu. In the words of Viscount Maugham, once the order is proved or admitted

"it must be taken *prima facie*, that is until the contrary is proved, to have been properly made and that the requisite as to the belief of the Secretary of State (here, the Governor) was complied with."

As regards proof of the orders, we find nothing in the proclamation under S. 93 to exclude the application of S. 59 (2), Constitution Act or cl. 10 (3) of the Ordinance. The proclamation suspends only so much of S. 59 as requires "consultation with the ministers." The mere fact that the detenu challenges the *factum* or the bona fides of the order or the fact that the officers of Government must naturally be in possession of information on the subject cannot be said to be "proof to the contrary" so as to make it incumbent on the Government to adduce evidence in support of the order. In 1942 A. C. 284,⁴ Goddard L. J. (as he then was) referred to the possible ignorance of the detenu as to the reasons for his internment and said that that would not shift the burden of proof, because "it in no way shows that the Secretary of State had not reasonable cause to believe or did not believe" that it was necessary to detain the person. Reference was made to (1943) 1 K. B. 607⁵ as to the extent of the proof required to rebut the presumption in such cases; but as no proof whatever is forthcoming in this case, no question of quantum of proof arises. The detenu no doubt made some sweeping assertions in his affidavits but no materials or sources of information with reference to which these assertions were made were disclosed in the affi-

davit. No value can therefore be attached to these assertions. Even these affidavits did not assert that the orders of 3rd July 1944 were not in fact made by the Governor. As regards the detenu's application to summon Mr. Houlton, it was certainly within the discretion of the learned Judges of the High Court to dismiss it, if they considered that it was only an attempt to fish for information that might be turned to some account by the detenu. To permit such a device would practically be to allow the rule as to the onus of proof to be circumvented.

It was next contended that the very fact of the cancellation of the order of 19th March 1942 by the order of 3rd July 1944 and the passing of a fresh order of detention on 3rd July 1944 showed mala fides. It was said that the orders of 3rd July 1944 were passed pending the further hearing before the High Court, in order to burke an enquiry into the circumstances connected with the order of March 1942. We are unable to draw any such inference from the sequence of these orders. Reports of the decisions of this Court and of the High Courts show that during 1943 and 1944 different views were held in different quarters as to the formalities necessary for a valid order of detention and as to the authority entitled to pass such an order. If in view of possible defects of this kind in connection with the order of 19th March 1942 a fresh order of detention was passed in July 1944 so as to avoid any argument based on such defects, such a course will not justify any inference of fraud or abuse of power.

It was next argued as a matter of law that once the order of 19th March 1942 had been cancelled, there was no power to pass a fresh order of detention except on fresh materials and it was contended that the learned Judges of the High Court were not justified in presuming that fresh materials must have existed when the order of July 1944 was made. The first step in this argument seems to us unwarranted. The observations of the Court of Appeal in (1942) 1 ALL E. R. 373⁶ show that in this broad form the proposition is untenable. It may be that in cases in which it is open to the Court to examine the validity of the grounds of detention a decision that certain alleged grounds did not warrant a detention will preclude further detention on the same grounds. But where the earlier order of detention is held defective merely on formal grounds there is nothing to preclude a proper order of detention being based on the pre-existing grounds themselves, especially in cases in which the sufficiency of the grounds is not

3. (1942) 1942 A. C. 206, *Liversidge v. Anderson*.

4. (1942) 1942 A. C. 284, *Green v. Secretary of State for Home Affairs*.

5. (1943) 1 K. B. 607, *Rex v. Carr-Briant*.

6. (1942) 2 K. B. 14 : 1942-1 All. E. R. 373, *R. v. Home Secretary, Ex-parte Budd*.

examinable by the Courts. There is equally no force in the contention that no order of detention can be passed against a person who is already under detention. The decision of the Patna High Court in 23 Pat. 252⁷ cannot be understood as laying down any such proposition as a general proposition of law. The learned Judges seem to have drawn an inference of fact from the circumstances of the case that the order then in question was not one made in the bona fide exercise of the Governor's powers.

It was finally contended that as the previous order of this Court directed an enquiry into the validity of the detention under the order of 19th March 1942, the decision of the High Court must be limited to that question and that it was not open to the High Court to base its decision on the subsequent order of 3rd July 1944. This contention proceeds on a misapprehension of the nature of habeas corpus proceedings. The analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings cannot be invoked here. If at any time before the Court directs the release of the detainee, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the petitioner. The appeal fails and is dismissed.

R.K.

Appeal dismissed.

7. ('44) 31 A.I.R. 1944 Pat. 354 : 23 Pat. 252,
Kamla Kant Azad v. Emperor.

A. I. R. (32) 1945 Federal Court 21

(*From Lahore*)

20th November 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULLAH KHAN JJ.

A. W. Meads — Appellant

v.

Emperor.

Criminal Appeal No. 7 of 1944.

(a) Government of India Act (1935), S. 270 (1)
— Interpretation of.

It is very difficult to make any logical grounds the basis of construing S. 270 (1). It is a section which is capricious in its operation. For instance if a person charged with an offence committed after 1st April 1937 had been employed in the affairs of a Province instead of having been employed in the affairs of the Government of India, there would be no question of S. 270 (1) having any operation at all. It is only because no Federation has hitherto been established that the question of the protection

1945 F. C./36

afforded by S. 270 (1) falls to be considered in respect of those still employed in connexion with the affairs of the Government of India. The Court cannot therefore accept too readily as a help in construing this section logical considerations. [P22C2; P23C1]

(b) Government of India Act (1935), S. 270 (1) — S. 270 (1) protects military officers also in proceedings instituted under ordinary civil or criminal law—But protection cannot be assumed to extend to proceedings under the military code.

No doubt military officers are given by S. 270 just the same protection in proceedings instituted under the ordinary civil and criminal law as is given to other servants of the Crown such as police and civil servants, but there is no logical reason to assume that a similar protection should extend to the institution of proceedings under the military code which is applicable to and peculiar to those classes of citizens subject to the provisions of the Army Act, and which necessarily imposes on those subject to it obligations and liabilities to which others are not subject. [P 23C 1]

(c) Interpretation of statutes — Court has no right to base decision on construction solely on results.

The Court has no right to base its decision on construction of the provisions of a statute solely on results. If the words are plain and can bear only one meaning in law the results are not a matter for the Court. [P 23 C 1]

(d) Army Act (1881), S. 2—Amendment of Act — Competency of Parliament.

Section 2 indicates the possible intention or policy of Parliament as to the recognised convenient method of confining amendments to the Army Act to the annual Acts extending the same but there can be no doubt of the competency of the Parliament to effect amendments of the Army Act by any other Act of Parliament. [P 23C 2]

(e) Government of India Act (1935), S. 270 (1) — Words "proceedings civil or criminal" in Section 270 (1) — Scope of—They do not include Court-martial proceedings under Army Act.

Whilst it may be proper in certain contexts to include Court-martial proceedings in the phrase "criminal proceedings" the ordinary primary meaning of the phrase "civil or criminal proceedings" indicates only the civil or criminal proceedings capable of being instituted under the ordinary law of the land, and should not be held to include proceedings under military law unless there be a context which so indicates. There is no such context in S. 270 or elsewhere in the Constitution Act. The words "proceedings civil or criminal" in S. 270 (1) have been used in their ordinary common meaning without any thought or reference to the Army Act, the Military Code, military offences or proceedings by Courts-martial and do not include military offences under the Army Act and the proceedings by Courts-martial under that Act : (1921) 2 A. C. 570 and 1943 A. C. 147, *Ref.* [P 23 C 2; P 24 C 1]

Appellant in person.

Sir Brojendra Mitter, Advocate-General of India, (R. C. Soni, Advocate, Lahore High Court, with him) instructed by K. Y. Bhandarkar, Agent—for the Crown.

Spens C. J.—The appellant in this case, A. W. Meads, was in April 1943 a Captain holding the temporary rank of Major in the Royal Engineers, and was attached to No. 1 Works Service (E. & M.) Group, I. E. In October 1943, he was charged with four offences

under the Army Act. The charges, without the particulars which are not material to this judgment, were as follows :

1st Charge, A. A. Section 17.—When on active service, when concerned in the care of public property, fraudulently misapplying the same.

2nd Charge, A. A. Section 40 alternative to 1st charge.—When on active service, neglect to the prejudice of good order and military discipline.

3rd Charge, A. A. Section 17.—When on active service, when concerned in the care of regimental property, fraudulently misapplying the same.

4th Charge, A. A. Section 40 alternative to 3rd charge.—When on active service, neglect to the prejudice of good order and military discipline.

The appellant was ordered to be tried by a Field General Court-martial. He was in due course so tried and was convicted in respect of the two offences charged under S. 17, Army Act, and was sentenced to two years' imprisonment and to be cashiered. The appellant thereupon filed a petition in the High Court at Lahore under S. 491, Criminal P. C. The important point raised on the hearing of that petition before the High Court was that the act complained of was committed by the appellant in the execution or purported execution of his duty as a servant of the Crown in India and that accordingly under S. 270 (1), Government of India Act, 1935, the Court-martial proceedings could not legally and properly be instituted against him without the previous consent of the Governor-General in his discretion. Section 270 (1) runs as follows: "No proceedings, civil or criminal, shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connexion with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connexion with the affairs of a Province, of the Governor of that Province in his discretion."

The short but very important point so raised before the High Court at Lahore is whether the Court-martial proceedings in question were criminal proceedings within the meaning of S. 270 (1). The petition under S. 491, Criminal P. C., was referred to a Full Bench of the Lahore High Court consisting of Sir Trevor Harries C. J., Abdur Rahman and Mehr Chand Mahajan JJ. In a very full and careful judgment it was decided on 12th April 1944 that the Court-martial proceedings in question were not criminal proceedings within S. 270 (1) and that there was no substance in this contention of the appellant. In

his petition under S. 491, the appellant also took other points as to the validity of the manner of constitution and proceedings of the Field General Court-martial. These too were all carefully considered by the Full Bench of the High Court who could find no legal substance in them. Accordingly, on 24th April 1944, the petition of the appellant was dismissed but a certificate under S. 205 (1), Constitution Act, was granted in respect of the question raised in regard to S. 270 (1), and from that order the appellant has appealed to this Court.

The appellant appeared and argued his case in person before us. In the Court below it had been argued on behalf of the appellant that all Court-martial proceedings under the Army Act were criminal proceedings within the meaning of S. 270 (1). But in view of the amazing consequences which, it was pointed out by the High Court, must result if this contention were right, the appellant before us limited his submissions and argued to the effect that (a) the acts on which the charges before the Court-martial were based were acts on which charges could have been framed under the ordinary criminal law of the land, (b) if the appellant had been charged under the ordinary criminal law of the land there was no doubt that the proceedings would have been criminal proceedings which could not have been instituted against the appellant without the previous consent of the Governor-General in his discretion, and (c) accordingly at least Court-martial proceedings in which a servant of the Crown in India was charged with offences in respect of acts which could equally be made the basis of a prosecution under the ordinary criminal law of the land, must be criminal proceedings for the purposes of S. 270 (1). There could be, it was suggested, no reason why if a servant of the Crown was proceeded against under the ordinary criminal law in respect of such acts he should be entitled to the protection afforded by S. 270 (1) whereas if he was proceeded against by Court-martial under military law he should not be entitled to such protection.

This Court has before now pointed out how difficult it is to make any logical grounds the basis of construing this section. It is a section which is capricious in its operation. For instance, had the appellant been employed in the affairs of a Province instead of having been employed in the affairs of the Government of India, there would have been no question now of S. 270 (1) having any operation at all. It is only because no Federation has hitherto been established that the question of the protection afforded by S. 270, sub-s. (1), falls to be considered in respect of those still

employed in connexion with the affairs of the Government of India. We cannot therefore accept too readily as a help in construing this section logical considerations such as those stressed by the appellant.

Moreover whilst we agree that military officers are given by S. 270 just the same protection in proceedings instituted under the ordinary civil and criminal law as is given to other servants of the Crown such as police and civil servants, there seems no logical reason to assume that a similar protection should extend to the institution of proceedings under the military code which is applicable to and peculiar to those classes of citizens subject to the provisions of the Army Act, and which necessarily imposes on those subject to it obligations and liabilities to which others are not subject. Further, in order to succeed in his submission, the appellant must somehow extract from the phraseology of S. 270 a difference in application or non-application according as Court-martial proceedings are in respect of acts on which charges under the ordinary criminal law could be based, or are in respect of acts on which no charge under the ordinary criminal law could be made.

In our view there is nothing to be found in the wording of the section to make a difference between Court-martial proceedings based on acts which constitute purely military offences under the Army Act and in respect of which no charge under the ordinary criminal law could be based, and Court-martial proceedings based on acts in respect of which either military offences under the Army Act could be charged or ordinary criminal proceedings could be taken. In our judgment there is no halfway house. Either all Court-martial proceedings under the Army Act are criminal proceedings within S. 270 (1), or no Court-martial proceedings are. If all Court-martial proceedings under the Army Act are criminal proceedings, there is no way to escape from the fantastic results which would follow from such a decision and which have been indicated at some length in the judgment of the Lahore High Court. On the other hand, this Court has no right to base its decision on construction solely on results. If words are plain and can bear only one meaning in law, results are not a matter for this Court, and there is no doubt that in some contexts the phrase criminal proceedings would be held to include Court-martial proceedings. See the speeches of their Lordships in the two cases, (1921) 2 A. C. 570¹ and 1943 A. C. 147.²

The question for us is whether the phrase "no proceedings civil or criminal" in the con-

text in which it is used in S. 270 (1), Constitution Act, should also be held to include Court-martial proceedings generally. It was suggested on behalf of the Crown that if we were to hold that Court-martial proceedings were included in S. 270 (1), the result would be that S. 270 (1) would be an important modification or amendment of the Army Act, and the Advocate-General of India relied upon the terms of S. 2, Army Act, *viz.*,

"This Act shall continue in force only for such time and subject to such provisions as may be specified in an annual Act of Parliament bringing into force or continuing the same,"

as indicating an intention or policy of Parliament that the Army Act should not be modified or amended except by provisions specified in the annual Acts of Parliament extending the life of the Army Act. He accordingly submitted that Parliament could not have intended to make such an important modification or amendment in respect of procedure by Courts-martial by anything contained in the Government of India Act. Alternatively, if such modification or amendment had been made, he argued that a similar provision should have been inserted in the next Army annual Act following the coming into force of the Constitution Act, and that the absence of any such provision indicated that no amendment or modification had been made. Whilst we are not prepared to differ as regards the possible intention or policy of Parliament as to the recognised convenient method of confining amendments to the Army Act to the annual Acts extending the same, there is no doubt of the competency of Parliament to effect amendments of the Army Act by any other Act of Parliament. The argument only goes to the unlikelihood of an important amendment or modification of this nature having been made by the Government of India Act rather than by some provision in an annual Army Act. The argument is not therefore conclusive and we are left to construe the material words as we find them in their context in the Government of India Act without any really decisive help or authority from outside.

Whilst, as indicated above, it may be proper in certain context to include Court-martial proceedings in the phrase 'criminal proceedings,' in our opinion the ordinary person who uses the phrase "civil or criminal proceedings" usually intends only to indicate the ordinary civil and criminal proceedings which can be taken in accordance with the ordinary law of the land, and does not have in mind the special and peculiar code of Military Law applicable only to the limited classes subject to it and the military offences created by that

1. (1921) 2 A. C. 570, *In re Clifford and O'Sullivan*.

2. (1943) 1943 A. C. 147, *Amand v. Home Secretary*.

code. In other words in our judgment the ordinary primary meaning of the phrase "civil or criminal proceedings" indicates only the civil or criminal proceedings capable of being instituted under the ordinary law of the land, and should not be held to include proceedings under military law unless there be a context which so indicates. We can find no such context in S. 270 or elsewhere in the Constitution Act. Indeed, there are indications in the context against giving the phrase any meaning other than its ordinary primary meaning. Sub-section (2) with its references to "the Court" and the recovery of costs and so forth is apposite enough to proceedings before the ordinary civil and criminal Courts, but is hardly apposite to proceedings by Courts-martial. Further, in support of our view of the meaning which we think would ordinarily be given to the material words, it is noteworthy that although S. 270 (1) has been in operation since 1st April 1937, during which time many Courts-martial must have taken place in this country, no one has hitherto suggested that the phraseology as used in S. 270 (1) includes proceedings under military law.

It may be true that the appellant might have been proceeded against in the regular Courts on some charge under the ordinary criminal law based on the acts in respect of which he has been charged under military law, but he has at no time been proceeded against under the ordinary criminal law, and all the charges with which he was charged before the Court-martial were "military offences" under sections of the Army Act. The whole proceedings against him have therefore been entirely under the Army Act and not in any way under the ordinary criminal law. In our judgment, unless we are compelled by some authority or by something in the context to hold that such proceedings under the Army Act must be deemed to be included in the phraseology of S. 270 (1), it would be unreasonable for us so to do. We think that the words "proceedings civil or criminal" have been used in their ordinary common meaning without any thought or reference to the Army Act, the Military Code, military offences or proceedings by Courts-martial, and we are satisfied that even though possibly such phraseology in other contexts may be held capable of including military offences under the Army Act or proceedings by Courts-martial, we are not bound to hold that they do so in the case of S. 270 (1), and we are not prepared so to hold. Accordingly, in our judgment the submissions of the appellant have no force and so far as this point is concerned the appeal must be dismissed.

We gave an opportunity to the appellant to

raise any other matter on account of which he considered that the proceedings against him were invalid or his conviction unjustified. He raised no new points. The points which he argued before us were all raised on his behalf in the High Court and were dealt with most fully in the judgment of the Full Bench. He was unable to indicate any respect in which the judgment of the Full Bench could be considered wrong. We agree with the judgment of the Full Bench on these other points raised by the appellant and we consider it unnecessary in the circumstances that we should deal with them further ourselves. This appeal must accordingly be dismissed.

G.N.

Appeal dismissed.

A. I. R. (32) 1945 Federal Court 24
(*From Lahore*)

19th January 1945

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.

Suraj Parkash — Appellant
v.

Emperor.

Criminal Appeal No. 13 of 1944.

(a) Government of India Act (1935), S. 270 —
Offence under S. 408 or S. 409, Penal Code —
Protection under S. 270 cannot be claimed.

The offence under S. 408 or S. 409, Penal Code, is not one in respect of which the protection of S. 270, Government of India Act, can be claimed :
(1939) 26 A. I. R. 1939 F. C. 43, *Rel. on.* [P 24 C 2;
P 25 C 1]

(b) Government of India Act (1935), S. 270 —
Proceedings instituted before sanction under
S. 270 are void — New proceedings must be in-
stituted after sanction.

In cases to which S. 270 applies if proceedings be instituted before sanction under the section is obtained, such proceedings are wholly void and new proceedings must be instituted after the sanction is obtained. Unless this view is strictly observed, the protection intended by the section would be liable to become in practice seriously reduced. [P 25 C 1]

Sardar Raghbir Singh, Advocate, Federal Court, instructed by Ranjit Singh Narula, Agent — for Appellant.

Sir Brojendra Mitter, Advocate-General of India, (H. K. Bose, Advocate, Federal Court, with him), instructed by K. Y. Bhandarkar, Agent, R. C. Soni, Advocate, Federal Court, instructed by Tarachand Brijmohanlal, Agent — for the Crown.

Spens C. J. — In this appeal it has been submitted that the appeal should be dismissed on the ground that under O. 17, R. 1, it was presented out of time. It has also been questioned whether the order appealed against is a final order within the meaning of those words in S. 205 (1), Government of India Act, 1935. We do not propose to deal with either of those points, for in any event in our judgment the offence under S. 408 or S. 409, Penal

Code, with which the appellant is charged is not one in respect of which the protection of S. 270, Government of India Act, 1935, can be claimed : *see* (1939) F. C. R. 159.¹ The appeal is accordingly dismissed.

We would, however, take this opportunity of saying that in cases to which S. 270, Constitution Act, applies, the words of the section in our view require that if proceedings be instituted before sanction under the section is obtained, such proceedings are wholly void and new proceedings must be instituted after the sanction is obtained. Unless this view is strictly observed, the protection intended by the section would be liable to become in practice seriously reduced.

G.N.

Appeal dismissed.

1. ('39) 26 A. I. R. 1939 F. C. 43 : I. L. R. (1940) Lah. 400 : I. L. R. (1939) Kar. F. C. 132 : (1939) F.C.R. 159 : 181 I.C. 317 (F.C.), *Hori Ram Singh v. Emperor.*

A. I. R. (32) 1945 Federal Court 25

(*From Madras :*

('44) 31 A. I. R. 1944 *Mad.* 340)

18th December 1944

SPENS C. J., VARADACHARIAR
AND ZAFRULLA KHAN JJ.

*RM. AR. AR. RM. AR. AR. Umayal
Achi — Appellant*

v.

Lakshmi Achi and others—Respondents.

Case No. 58 of 1943.

(a) Hindu Women's Rights to Property Act (1937), S. 3 (1) — Act is not wholly ultra vires — Act held to be valid enactment—Government of India Act (1935), Ss. 316, 317 (*Per Spens C. J., and Varadachariar J.; Zafrulla Khan J. dissenting*).

The validity of Act 18 of 1937 was impugned. The circumstances which raised doubts as to the validity of the Act were that the bill, which ultimately became law (as Act 18 of 1937), was passed by the Legislative Assembly of the Indian Legislature on 4th February 1937, that is, before Part 3 of the new Constitution Act came into operation, but it was passed by the Council of State only on 6th April 1937, that is, after Part 3 had come into operation and it received the Governor-General's assent on 14th April 1937. At the time that the bill was passed by the Legislative Assembly, the Central Legislature had the power to legislate in respect of all property moveable or immovable; but by the time that the bill was considered by the Council of State, the Indian Legislature had been precluded from dealing with "devolution of agricultural land", as it was one of the subjects enumerated in List 2 of Sch. 7. On these facts, various contentions bearing upon the validity of the Act had been advanced: It was contended (a) that on the introduction of the new constitution on 1st April 1937, it was no longer open to the Council of State to treat the bill as one which it could take up for consideration and that therefore the bill could not be deemed to have been passed by 1945 F.C./4 & 5

"both Chambers of the Indian Legislature"; (b) that the content of the bill as passed by the Council of State was different from the content of the bill as passed by the Legislative Assembly, and that therefore it could not be said that the Council of State "agreed to" the bill as passed by the Assembly or that the agreement, if any, was "without amendment"; (c) that on the true construction of S. 316, Constitution Act, any subsequent enactment of the Indian Legislature would have validity only if it had been initiated after 1st April 1937; (d) that as the Act purports to deal generally with "property", it was ultra vires the Indian Legislature so far as agricultural land could be comprehended within that general term and that it was not open to the Court to attempt to give it validity by excluding agricultural land from its operation :

Held (*Per Spens C. J., and Varadachariar J.; Zafrulla Khan J. dissenting*) that the objections to the validity of the Act were untenable. The Act was validly enacted by the Legislature. The Act was not wholly ultra vires the Indian Legislature although it could not affect the devolution of agricultural land in Governors' provinces. [P 31 C 1, 2; P 40 C 2; P 46 C 2]

Per Varadachariar J. — The effect of the words "notwithstanding the repeal" of the old Act and "continue to have effect" in S. 317 is to indicate that the provisions relating to the Indian Legislature have been continuous in their operation and there is no justification for importing a theory of repeal and of re-enactment in respect of those provisions. All that S. 63 of Sch. 9 requires is that a bill should be agreed to by both Chambers, by each of them successively passing it. This passing is a fact in respect of each Chamber; and, as a fact, it had duly taken place so far as the Assembly was concerned, at a time when it had legal existence and was competent to consider and pass the bill. What had happened, in the meanwhile, did not deprive the Council of State of the power to deal with that bill in the usual course. Whether a bill has been passed without amendment is a question of fact and it is not open to the Court to speculate as to what is likely to have been in the minds of the members of the Council of State when they dealt with the bill. These are certainly "internal" matters which are beyond the jurisdiction of the Court to inquire into. There is nothing in the language of S. 316 to support the contention that a law must be initiated only after 1st April 1937. The rule in (1891) A. C. 455 does not rest on any inference as to the actual intention of the members who took part in the enactment of the measure but on a legal presumption as to the intention to be attributed to the Legislature as a legal entity. Though there was one state of the law as to the powers of the Legislature at one stage and another state of the law as to its powers at another stage, it did not preclude the application of the principle of that decision to the Hindu Women's Rights to Property Act. The efficacy and operation of the Act must be determined with reference to the point of time when the process of its becoming a law has been completed. [P 29 C 2; P 30 C 1, 2; P 31 C 1, 2]

Per Spens C. J. — When a Court ascertains that a bill has in fact been passed by both Chambers of the Indian Legislature in exactly the same words and form and has so been assented to by the Governor-General, it is impossible and improper for the Court further to investigate whether each Chamber and the Governor-General gave the same meaning and connotation to the common terms used. It is not therefore permissible for a Court to investigate the actual meaning or connotation alleged to have been given to or held regarding words and phrases in bills by individual legislators at the time a bill is

passed by the Chamber of which they are members. Nor can a Court be asked to make presumptions from the powers of the Legislature at the material dates or from any other circumstances as to the meaning or connotation given to or held regarding words or phrases in bills by the members of Legislative Chambers who pass the bills. The powers of the Legislature cannot be used to found any such presumptions. It cannot therefore be presumed that the Council of State and the Governor-General did not legally agree to the bill as passed by the Legislative Assembly. The effect of S. 317 is *prima facie* to establish the uninterrupted continuation of the Indian Legislature and its legislative procedure, notwithstanding the formal repeal of the existing legislation in S. 321. It continues the same Legislature and the same procedure for legislation. There is no break or division on 1st April 1937, by reason of the repeal. The powers of a Legislature, that is to say, the field within which it is authorised to legislate, may vary from time to time without in any way affecting the validity of the enacting processes of that Legislature. Such variation may well result in a Court having to hold legislation *ultra vires* in part or even in whole, but that is a different matter from holding that legislation is invalidly enacted. What the powers of a Legislature or the area of authorised legislation are whilst a bill is going through the different preliminary stages of legislation, cannot affect the validity of the process of enactment. The area in which a Legislature is authorised to legislate only comes to be examined if and when the enacting operations are complete, should there be any question of the Act being *ultra vires*, and the material date for the examination of the powers or area of authorised legislation for this purpose is the date when the Act becomes law. For laws of the Indian Legislature it was not necessary that they should be completely enacted through all their stages either wholly before or wholly after 1st April 1937. [P 38 C 1, 2; P 39 C 2 P 40 C 1]

Per Zafrulla Khan J.—The Court is not debarred from investigating whether a piece of legislation, which appears on the face of it to have been agreed to by both Chambers of the Indian Legislature without amendment and to have received the assent of the Governor-General, was or was not validly enacted by reason of any alleged lack of power or capacity in one or both Chambers to function effectively. The effect of the repeal of S. 65 of the Act of 1919 was that the Indian Legislature was divested of all power to legislate on any subject whatever and by virtue of the coming into operation of Ss. 316 and 317, Constitution Act, it was immediately invested with power to legislate in accordance with the provisions of the Constitution Act. Not only had the Council of State on 6th April 1937 no power to convert by its agreement into a Federal law a Bill that had been passed by the Assembly while functioning under S. 65 of the Act of 1919 before the transition period, it had clearly no power at all to agree to the Hindu Women's Rights to Property Bill as passed by the Assembly however much it might have desired to do so, inasmuch as its power to legislate under the Constitution Act did not include power to legislate with respect to succession to agricultural land—a matter which had been expressly and validly included by the Assembly within the purview of the Bill. The Act cannot be treated as having been passed by the Indian Legislature while functioning as the Federal Legislature within the meaning of S. 316, Constitution Act. The question of severability does not strictly arise in this case. The Legislature that enacted the law was thus neither the Indian Legislature functioning under S. 65 of the Act of 1919 and having power to legislate with respect to every kind of pro-

perty, nor the Indian Legislature functioning as the "Federal Legislature" during the transition period under S. 316, Constitution Act, having no power to legislate with respect to agricultural land. One Chamber of the Indian Legislature functioning under the Act of 1919 could not co-operate with the other Chamber of the Indian Legislature functioning under S. 316, Constitution Act, to make valid laws. There is therefore no room in this case for the application of the rule in (1891) A. C. 455. [P 42 C 1, 2; P 44 C 2; P 45 C 1, 2; P 46 C 1]

(b) Hindu Women's Rights to Property Act (1937), S. 3 (1)—"Separate property"—Property held by last surviving coparcener is not.

The expression "separate property" may be the antithesis of three other expressions, viz., "ancestral property," "coparcenary property" and "joint family property." It is necessary to determine, in the light of the scheme of the Act, the particular sense in which the expression has been used in S. 3 (1). Property held by a Hindu as the last surviving coparcener of a joint family cannot be regarded as "separate property" within the meaning of S. 3 (1) of Act 18 of 1937. [P 32 C 1, 2; P 34 C 1]

(c) Hindu Women's Rights to Property Act (1937) — Interpretation — Possibility of varying consequences cannot control natural meaning (*Per Varadachariar J.*).

The possibility of varying consequences cannot be allowed to control the natural and reasonable interpretation of the Act. It is *prima facie* prospective and its proper construction and operation must be determined with reference to conditions and contingencies likely to arise after its commencement, because these alone could presumably have been within its contemplation. [P 33 C 2]

(d) Succession—Moveables—Law of domicile of owner applies.

The distribution of the distributable residue of the moveables, wherever they may be situate, is ordinarily governed by the law of the domicile of the owner at the time of his death. It can make no difference for this purpose whether the law of the domicile rests on Common law or on Statute law. It may be that the collection and administration of these assets will, in some measure, be governed by the law of their locality. But the ultimate succession thereto and the distribution thereof will be governed by the law of the domicile. But the law of domicile does not furnish the rule of succession to immovable property. [P 34 C 1, 2]

(e) Maxim — "Mobilier sequuntur personam" (*Per Varadachariar J.*).

The maxim "Mobilier sequuntur personam" which is generally relevant to the law of succession has ordinarily no place in the law relating to taxation. [P 34 C 2]

(f) Hindu law — Succession — Widows take not as tenants-in-common but as body or unit (*Per Varadachariar J.*).

Under the Hindu law, the widows of a person inherit as a body or as a unit and not as tenants-in-common, though, after they have so inherited, they may, for convenience of enjoyment, divide the property between themselves. [P 35 C 1]

(g) Hindu Women's Rights to Property (Amendment) Act (11 of 1938) — Act is explanatory.

The provision in Act, 11 of 1938, is only in the nature of an explanatory enactment and there will be no justification for making any difference between the foreign moveables and the properties in British India, so far as the quantum of the daughter-in-law's share is concerned. [P 35 C 2]

(h) Hindu Women's Rights to Property Act (1937)—Scope.

Act 18 of 1937 is intended to apply only to property beneficially owned by the propositus and not to anything in the nature of a trusteeship.

[P 35 C 2]

(i) Government of India Act (1935), S. 213 — Reference under — Opinion under, can be reconsidered. (Per *Spens C. J.*)

Any opinion of the Federal Court given upon a reference under S. 213 can properly be reconsidered at any time by the Federal Court in any litigation coming before it and should be so reconsidered on the proper request of any party however much respect for the Judges responsible for an opinion and a desire to secure continuity and certainty in the pronouncements of the Federal Court may make a member of the Federal Court hesitate to differ.

[P 36 C 2]

(j) Constitutional law — Legislature — Some members vacating—Same Legislature continues.

By a proper enactment binding upon the Legislature, the compulsory vacation of some members of their seats does not and cannot ipso facto cause the continuing Legislature, less those members, to be a different Legislature in law. It is the same Legislature carrying on without the excluded members.

[P 39 C 1]

Sir Brojendra Mitter and Kesava Ayyangar, Senior Advocates, Federal Court (C. S. Rama Rao Sahib, Advocate, Federal Court, with them) instructed by Ganpat Rai, Agent —
for Appellant.

T. R. Venkatarama Sastri, Senior Advocate, Federal Court (K. S. Sankara Aiyar, Advocate, Federal Court, with him) instructed by B. Banerji, Agent; and Sir Alladi Krishnaswami Aiyar, Senior Advocate, Federal Court (N. Rajagopala Iyengar, Advocate, Federal Court, with him) instructed by Naunit Lal, Agent — for Respondents 1 and 2, respectively.

Varadachariar J. — This appeal arises out of an administration action. As one of the principal questions to be determined in the case relates to the validity of the Hindu Women's Rights to Property Act (Act 18 of 1937), a certificate under S. 205, Constitution Act, was granted by the High Court at Madras, which heard the appeal against the preliminary decree. The last owner of the suit properties was one Arunachalam Chettiar, a resident of South India, who owned properties and assets of large value in British India, Mysore, Ceylon, Burma, the Malay States and Cochin China. He married three wives, the first of whom is said to have died in 1913 leaving behind her three daughters and a son; the son died in 1934, leaving the plaintiff, his widow, him surviving. Arunachalam married the second wife after the death of the first; but when the plaintiff's husband died, he was left sonless, as the second wife had borne him no son. He accordingly married the third wife in 1935. Arunachalam died on 23rd February 1938. The two wives, who survived him, are defendants 1 and 2 in this suit. On 8th

January 1938, Arunachalam executed a will (Ex. B) and had it registered on the very next day. In view of the then state of his family, which consisted of six women (*viz.*, plaintiff and defendants 1 and 2 and three daughters by the first wife) and a baby daughter of the third wife, he appointed two of his near relatives as executors and entrusted to them the management of his large estate and of the numerous religious and charitable trusts with which he was connected. He directed the executors to arrange for the adoption of three suitable boys by the two wives and by the daughter-in-law, respectively; and the will, provided that after certain legacies had been paid, the rest of his moveable and immovable properties should be equally divided between the three adopted sons. The executors were, in the meanwhile, asked to pay certain sums of money to the plaintiff and to defendants 1 and 2 for their maintenance and for religious expenses. No adoption has taken place in pursuance of these directions of the testator; the executors claim that till the adoptions take place, they are entitled to remain in possession and management of the estate.

Under the ordinary Hindu law, the plaintiff, who is only a daughter-in-law of the last owner, would not be an heir to his estate. But the Hindu Women's Rights to Property Act, 1937, has conferred certain rights on the widow of a predeceased son. The plaintiff claimed that under that Act she was entitled to a half-share in the estate. She disputed the genuineness of the will (Ex. B) but claimed in the alternative that she was, in any event, entitled to possession of a half-share after the legacies had been paid. She denied that the executors had any right to remain in possession till the adoptions, if any, should take place. She filed this suit in July 1938 asking for partition and delivery to her of a half-share in the estate, after the payment of the legacies (if the Court should hold the will to be genuine).

The executors (defendants 3 and 4) supported the will and claimed that they were entitled to remain in management till the adoptions were made as per the directions in the will. Defendant 1, who was the senior widow, denied the genuineness of the will, while defendant 2 affirmed it. Defendant 1 also contended, that even if the will was genuine and valid, the executors were not entitled to retain possession indefinitely. All the defendants joined in denying the plaintiff's claim to a share in the estate. They contended that the Hindu Women's Rights to Property Act was invalid and that, in any event, it had no application to the case. They further contended that even on the basis of

the Act, the plaintiff would not be entitled to any share (1) in agricultural lands belonging to the deceased situate in British India, (2) in his immovable properties and personal assets situate outside British India, and (3) in the right to manage the religious and charitable trusts. A question was also raised as to the exact share which the plaintiff could claim under the Act. Of the issues framed in the case, only issues 12, 17 and 18, are now material. They run as follows :

"(12) Whether Act 18 of 1937 referred to in the plaint is ultra vires as contended by defendants and whether at any rate it cannot affect the devolution of the agricultural lands in British India and properties situate outside British India ?

(17) To what shares are the plaintiff and defendants 1 and 2 entitled in the private properties of the propositus ?

(18) Whether the plaintiff is entitled to inherit the trust estate held by the testator or whether defendants 1 and 2 are entitled to the trust estate exclusively ?"

Issue 18 is not happily worded : What was meant was whether the plaintiff could claim the right to take part in the management of the trusts as a co-trustee. The trial Court found the will (Ex. B) to be genuine and valid; this finding has been accepted by the parties. It also held that the executors were not entitled to remain in possession indefinitely pending the adoption ; this finding too has been accepted. On a finding that Act 18 of 1937 was valid, the trial Court held that the plaintiff was entitled to a half share in all the immovable properties of the deceased situate in British India, and in all the moveable assets of the deceased wherever situate, subject to the payment of the legacies, etc., provided for in the will. As regards immovable properties situate outside British India, the Court held that the rights of the parties should be determined with reference to the *lex sitæ*. It dismissed the plaintiff's claim to a share in the trusteeship of the religious and charitable endowments. A preliminary decree embodying the above declarations and certain other directions, to which it is not now necessary to refer, was passed on 26th October 1940. On appeal, the High Court at Madras modified this decree limiting the plaintiff's right, (1) in respect of the immovable properties of the deceased in British India, to a share in non-agricultural properties and (2) in respect of the moveable properties of the deceased, to a half share in so much only thereof as lay within British India. The High Court gave certain further directions which are not material to this appeal.

The plaintiff, who has filed this appeal, questions the correctness of the decision of the High Court on two points—(1) the limitation

imposed in respect of the moveable properties to the effect that she can claim a share only in so much thereof as are within British India; and (2) the rejection of her claim to a share in the management of the religious and charitable trusts. The widows of the deceased impugn the correctness of the decision in favour of the validity of Act 18 of 1937. They also contend that on its true construction, it does not operate to give the plaintiff a share in the properties which form the subject-matter of this action. They further contend that if the plaintiff's claim to a share in the foreign assets should be upheld, she would not on a proper interpretation of the Act be entitled to more than a third share. As two of the defendants' contentions, viz., the one relating to the validity of the Act 18 of 1937 and the other relating to the applicability of the Act to the properties claimed in this suit, go to the root of the plaintiff's claim, it will be convenient to deal with them at the outset.

The question relating to the validity of Act 18 of 1937 has been before this Court on a previous occasion, on a reference made by the Governor-General under S. 213, Constitution Act. The circumstances which raised doubts as to the validity of the Act are that the Bill, which ultimately became law (as Act 18 of 1937), was passed by the Legislative Assembly of the Indian Legislature on 4th February 1937, that is, before Part III of the new Constitution Act came into operation, but it was passed by the Council of State only on 6th April 1937, that is, after Part III had come into operation and it received the Governor-General's assent on 14th April 1937. At the time that the Bill was passed by the Legislative Assembly, the Central Legislature had the power to legislate in respect of all property moveable or immovable; but by the time that the Bill was considered by the Council of State, the Indian Legislature had been precluded from dealing with "devolution of agricultural land," as it was one of the subjects enumerated in List 2 of Sch. 7. On these facts, various contentions bearing upon the validity of the Act have been advanced : (A) It was contended that on the introduction of the new Constitution on the first day of April 1937, it was no longer open to the Council of State to treat the Bill as one which it could take up for consideration and that therefore the Bill could not be deemed to have been passed by "both Chambers of the Indian Legislature"; (B) It was next said that by reason of the change introduced by the Constitution Act in the powers of the Indian Legislature, the content of the Bill as passed by the Council of State was different from the content of the Bill as passed by the Legislative Assembly, and that therefore it could not

be said that the Council of State "agreed to" the Bill as passed by the Assembly or that the agreement, if any, was "without amendment": (C) It was further contended that on the true construction of S. 316, Constitution Act, any subsequent enactment of the Indian Legislature would have validity only if it had been initiated after the first day of April 1937: (D) It was lastly contended that as the Act purports to deal generally with "property," it was ultra vires the Indian Legislature so far as agricultural land could be comprehended within that general term and that it was not open to the Court to attempt to give it validity by excluding agricultural land from its operation. On the Governor-General's reference, this Court after due consideration of the above objections reported that the Act was valid and operative except to regulate succession to agricultural land in the Governors' Provinces. Having regard to the special character of that proceeding, the parties to the present appeal claimed and were allowed liberty to deal with the whole question at length.

(A) Taking the objections seriatim, the first objection rests on the assumption that, when the new Constitution came into operation on the first day of April 1937, everything that had been done before ceased to have any operation or existence in the eye of the law, except in so far as it had been saved by the new Act. In support of this argument, reliance was placed upon the decision in (1916) 1 K. B. 688,¹ where, following (1829) 9 B & C. 750,² it was held that a bye-law made under a repealed statute ceased to have any validity thereafter unless the repealing Act contained some provision preserving the validity of the bye-law notwithstanding the repeal. It was pointed out that it was in recognition of this principle that S. 292, Constitution Act, expressly provided for the continuance of all existing Indian laws. Reference was also made to Rule 9 of the Government of India (Commencement and Transitory Provisions) Order, 1936. In dealing with this contention, it is necessary to consider the terms and effect of S. 317, Constitution Act, by which some of the provisions of the former Government of India Act were continued. Section 321, Constitution Act, no doubt purports to repeal the previous Government of India Act, but, as it was the intention of the framers of the Act to bring the federal portion of the constitutional scheme into operation only sometime later than the commencement of the provincial scheme, provision was made in Part 13 of the Act for the transition period. As part of the transition

arrangement, S. 317 provided that most of the provisions of the former Government of India Act so far as they related to the Central Government and to the Indian Legislature, should continue to have effect, notwithstanding the repeal of that Act. These provisions (with a few amendments) have been reproduced in Sch. 9 to the Constitution Act. The words "notwithstanding the repeal" of the old Act and "continue to have effect" are significant. Their effect is to indicate that the provisions relating to the Indian Legislature have been continuous in their operation, and I see no justification for importing a theory of repeal and of re-enactment in respect of those provisions. It is true that Parliament thought it necessary or proper to enact S. 292; but that was called for, not merely as a measure of caution but also as a necessary provision to secure the continuance of the laws that had been enacted prior thereto, by the provincial Legislatures. On 1st April 1937, the provisions of the former Government of India Act ceased to have operation so far as they related to the provincial Governments and the provincial Legislatures, and they were replaced by the provisions of Part. 3 of the new Act. The laws, which had theretofore been passed by the provincial Legislatures, could accordingly be kept alive only by a provision on the lines of S. 292. The argument based upon R. 9 of the Order-in-Council of 1936 does not seem to me to carry the respondents much further. The reason for the rule is not very clear and the rule itself was repealed by another Order-in-Council dated 18th March 1937, that is, even before the new Constitution came into operation—(India and Burma Transitory Provisions Order, 1937, Rule 9). Reading the two Orders together, it seems probable that R. 9 of the Order-in-Council of 1936 was intended to place a time limit on certain enactments, viz., those passed by the Indian Legislature prior to 1st April 1937 but intended to come into operation only after 1st April 1937. There was this anomaly about such legislation, that it would have been passed at a time when the Indian Legislature was not subject to the limitations introduced by the new scheme of distribution of powers between the Central and Provincial Legislatures, but that it would come into operation only after this distribution had also come into operation. Such legislation was, for this reason, apparently regarded as not standing on the same footing as other existing Indian law, whose operation had been saved by S. 292 in general terms, and therefore only a limited validity was thought fit to be given to it.

If the true position be as above indicated, the argument based on the principle of the

1. (1916) 1 K. B. 688, *Watson v. Winch*.

2. (1829) 9 B. & C. 750, *Surtees v. Ellison*.

decision in (1916) 1 K. B. 688¹ will not help the respondents. It is not without significance for this purpose to note that, during the transition period, the former Indian Legislature was regarded as continuing to exist and to function. Section 316, Constitution Act, refers to the "Indian Legislature" but that expression is nowhere defined in the Act; and the Act contains no indication that the old Legislature was to be regarded as dissolved, and a new legislature was brought into existence, either in fact (by a new election) or even by a fiction of law (by declaring the old Legislature to be the Indian Legislature for the purposes of the Act). Reliance was placed on R. 8 of the Order-in-Council of 1936, according to which, such of the members as had been elected or nominated to represent Burma or Burma constituencies, had to vacate their seats on 1st April 1937. The language of this rule is, if anything, more consistent with the view that the legal existence of the Chambers was regarded as continuing; the provision for some members 'vacating' their seats would hardly be appropriate if the intention was that the Chamber itself should be deemed to have been dissolved.

Should it however be assumed that the portion of the former Government of India Act relating to the Indian Legislature had been so dealt with by the new Act as to invite the application of the principles relating to the repeal of an enactment, the present question must be determined with due regard to the effect of S. 38 (2), Interpretation Act. This provision saves all 'things done' during the time that the former law was in force. The ordinary illustration of its application would no doubt be a completed legal act. That would be so when the attempt is made to enforce the legal consequences arising from such act. But the nature of the completion required will depend upon the nature of the act itself. In the present case, the completeness of the action to be taken by the Legislative Assembly consisted in the passing of the Bill through the Assembly, and this had been done as early as in February, that is, long before the old Act was repealed. It is true that this act by itself would not secure to measure the character of law; but that is not the question here. All that S. 63 of Sch. 9 requires is that a Bill should be agreed to by both Chambers, by each of them successively passing it. This passing is a fact in respect of each Chamber; and, as a fact, it had duly taken place so far as the Assembly was concerned, at a time when it had legal existence and was competent to consider and pass the Bill. The rules regulating legislative business contain provisions as to the lapse of Bills in certain con-

tingencies. It has not been suggested that, in the present case, the Bill, which had been passed by the Assembly, lapsed according to any of those rules. The position therefore was that, in the beginning of April 1937, the Council of State had before it a Bill, which had been duly passed by the Assembly. I am unable to hold that what had happened, in the meanwhile, deprived the Council of State of the power to deal with that Bill in the usual course.

(B) In dealing with the second objection, it is necessary to keep the question of fact distinct from the question of law. Section 63 of Sch. 9 requires that a Bill should be agreed to by both Chambers without amendment, or if any amendment was introduced, such amendment should also be agreed to by both Chambers. The rules relating to legislative business prescribe the procedure to be followed if and when an amendment is sought to be introduced. It has not been suggested in this case that any amendment, in this sense, was introduced when the Bill was before the Council of State; and, it has not been denied that, according to the official report, the Bill was reported to have been duly passed by the Council of State without amendment: (*see* R. 117 of the Council Rules). These are questions of fact, and it is not open to the Court to speculate as to what is likely to have been in the minds of the members of the Council of State when they dealt with the Bill. The argument seems to be that, if as a matter of law the Council of State had at that time no power to legislate in respect of agricultural land, the members must be deemed to have passed a Bill dealing only with non-agricultural property and that therefore the Bill passed by them was a different Bill from that passed by the Assembly. This argument mixes up the question of fact with the question of construction. For aught one knows, some of the members of the Council of State might have assumed that, as the Bill had been passed by the Assembly when the old Constitution was in force, it would throughout be governed by the old law. Other members might have thought that the matter was not free from difficulty but that it was not their business to come to a decision upon it and they might have left it to the Court to determine the precise operation of the law. Others still might not have exercised their minds over the question at all. These are certainly "internal" matters which are beyond the jurisdiction of the Court to inquire into. It is of course open to the Court to construe the Act in such manner as it may think proper; it may, if it thinks fit, hold the Act to be *ultra vires*. These are questions to be considered under

another head of objection (D). But there is no warrant for saying that the Bill was not duly passed by the Council of State or that it was amended when it was before the Council of State.

(C) The argument based on s. 316, Constitution Act, seems to me to have no force. The second part of para. 1 of that section is only in the nature of an interpretation clause, declaring that references in the body of the Act to Federal Legislature and Federal Laws shall, during the transition period, be taken to refer to the Indian Legislature and to laws passed by the Indian Legislature. The first part of that paragraph became necessary because, pursuant to the scheme of distribution of legislative powers between the Centre and the Provinces, s. 65 of the former Government of India Act (which defined the powers of the Indian Legislature) was omitted from Sch. 9 to the new Act. The result of the opening words of s. 316 is that the general powers, possessed by the Indian Legislature under the former Constitution, are subjected to the limitation introduced by the scheme of distribution of legislative powers between the Centre and the Provinces in the new Constitution. It may be that, as a matter of law, every measure which becomes law after 1st April 1937 must be judged with reference to the new Constitution; and the process of becoming law is completed only when the Governor-General gives his assent to a Bill which has been passed by both Chambers of the Indian Legislature . . . (s. 68 of Sch. 9). But there is nothing in the language of s. 316 to support the contention that such a law must be initiated only after 1st April 1937. Reference was made in this connexion to certain observations in 1940 F. C. R. 188.³ They throw no light on this question. The distinction there drawn was between measures which had become laws before 1st April 1937 and measures passed later. The point of time for the initiation of such later laws was not and had not to be considered in that case.

(D) In dealing with the last contention, it may be conceded that Act 18 of 1937 cannot affect the devolution of agricultural land in the Governors' Provinces; but it would not follow that the Act was on this account wholly ultra vires the Indian Legislature. It was pointed out in the advisory opinion given by this Court that on the principle of the decision in (1891) A. C. 455,⁴ the general term

"property" used in the Act must, as a matter of construction, be limited to property in respect of which the Indian Legislature had power to legislate. It has been argued that this course would be inconsistent with the answer above given to the second objection. It was presented as a kind of dilemma that the Council of State should either be deemed to have limited the measure to non-agricultural property and thus departed from the measure as passed by the Legislative Assembly, or be deemed to have legislated in respect of all kinds of property and therefore exceeded its jurisdiction. As already stated, this argument mixes up the question of fact with the question of construction or legal presumption. The rule in (1891) A. C. 455⁴ does not rest on any inference as to the actual intention of the members who took part in the enactment of the measure but on a legal presumption as to the intention to be attributed to the Legislature as a legal entity. It is true that the particular combination of circumstances that we find in this case, viz., one state of the law as to the powers of the Legislature at one stage and another state of the law as to its powers at another stage, did not exist in (1891) A. C. 455,⁴ but that will not preclude the application here of the principle of that decision. The efficacy and operation of the Act must, in circumstances like the present, be determined with reference to the point of time when the process of its becoming a law has been completed. The statute considered by their Lordships in (1891) A. C. 455⁴ used the wide terms "whosoever" and "wheresoever". The Court, as a Court of construction, searched for a "reasonable limitation" to these general words and so construed the words as not to attribute to the Legislature an effort to enlarge its jurisdiction beyond the powers committed to it. On this view, it was said that in the present case, the word "property" would mean one thing for the Governors' Provinces and a different thing for the Commissioners' Provinces, because, in respect of the latter, the Indian Legislature enjoys the powers of the Central Legislature as well as the Provincial Legislature. This anomaly is the result of the constitution and is not due to any defect in the measure. If, for instance, the enactment had contained a definition clause stating that "property" in the Act meant all property in respect of which the Legislature was competent to legislate, the result would have been the same. In the absence of such a definition, the same result is brought about by the rule of construction recognised in (1891) A. C. 455.⁴ The objections to the validity of Act 18 of 1937 are therefore, in my opinion, untenable.

3. (41) 28 A.I.R. 1941 F. C. 47 : I.L.R. (1941) Kar. F. C. 25 : 1940 F. C. R. 188 : 192 I. C. 225 (F.C.), Subrahmanyam Chettiar v. Muttuswami Goundan.

4. (1891) 1891 A. C. 455, Macleod v. Attorney General for New South Wales.

It was next contended on behalf of the respondents that the learned Judges of the High Court applied a wrong test in determining whether the properties in the suit were "separate property" within the meaning of S. 3 (1) of Act, 18 of 1937. The learned Judges have dealt very briefly with this point. They proceeded on the footing that the suit properties had come to Arunachalam as the last surviving member of a Mitakshara joint family, but they held that the suit properties were separate properties of the deceased because he had full disposing power over them. They were of the opinion that the Act itself was enacted "in order to give a widow and a predeceased son's widow a share in the estate of the deceased over which he had a disposing power." With all respect to the learned Judges, we think, in the light of the arguments urged before us, that the question requires a more detailed examination of the scheme of the Act with due regard to the established rules of Hindu law. In cases governed by the Mitakshara School of Hindu Law, the expression "separate property" has sometimes been used in a limited sense, to denote what is known as self-acquired property. (See Mulla, 9th Edn., para. 230). But, judged by the test of power of disposition, two other kinds of property held by a Hindu governed by that law, viz., property obtained as his share at a partition and property held by him as a sole surviving coparcener may, in some measure, resemble self-acquired property. There is, however, this difference between them, viz., that in the case of self-acquired property, the owner's power of disposition will continue to remain undiminished throughout his life-time, unless he chooses voluntarily to throw it into the joint family stock, whereas, in the case of the other two kinds of property, his power of disposition will become qualified and his interest reduced the moment a son is born to him or the widow of a predeceased coparcener takes a boy in adoption. It would not therefore be right to place these three kinds of property on the same footing merely on the ground that at a particular point of time, the owner may enjoy unrestricted powers of disposition over them. That is why in enumerating the several items constituting "separate property" in para. 230 of his book on Hindu Law, Sir Dinshah Mulla has taken care to add certain qualifying words in respect of items 6 and 7 (share obtained on partition and property held by sole surviving coparcener). The expression "separate property" may be the antithesis of three other expressions, viz., "ancestral property", "coparcenary property" and "joint family property". It is necessary

to determine, in the light of the scheme of the Act, the particular sense in which the expression has been used there.

It is true, as the preamble enacts, that the measure was intended "to give better rights to women". But it must be remembered that the Act was not a codifying Act or even a general amendment of the Hindu Law of Inheritance. It will help us to ascertain the precise scope of the Act, if we can ascertain the defects which it set out to remedy. Even under the ordinary Hindu law, a widow would in certain circumstances have succeeded to the property held by her husband as the last surviving coparcener or as the holder of a share obtained on partition. By themselves, these cases did not call for the interference of the Legislature. It is only if the owner had sons (including in that term, grandsons and great grandsons) that the widow would be excluded by the sons. Legislative interference was required to obviate hardship when the owner left a widow as well as sons. Once we take note of the contingency requiring legislative interference, the difference between separate property in the strict sense and separate property in the loose sense will become apparent. In the former case, the sons would not become coparceners with their father and the inheritance would devolve on them only at their father's death. But in the case of property obtained by the father on partition or obtained by him as the last surviving coparcener, the moment sons are born to him, they will become coparceners and there will be no occasion for the property devolving on them at the death of the father. The closing words of S. 3 (1) of the Act, viz., "devolve upon his widow along with his lineal descendants in like manner as it devolves upon a son" will be appropriate to the former case but not to the latter case. The language of the clause substituted by Act 11 of 1938 is slightly different but the scheme remains the same. The widow was certainly not intended to become a coparcener with her husband even during his life time. The Act of course intended to redress the widow's disabilities even in such a case; but that redress is provided by sub-s. (2) and not by sub-s. (1) of S. 3. When the sons become coparceners with their father in property which was originally held by him as sole surviving coparceners or as his share obtained on partition, the father and the sons become a joint family within the meaning of sub-s. (2) and when the father dies his widow will under sub-s. (2) get his share.

Taking next the case of the widow of a predeceased son or predeceased grandson, the difference between separate property in the strict sense and the other kinds of pro-

perty above referred to is equally marked. In the case of property obtained by the father on partition or as sole surviving coparcener, the son or grandson would have become a coparcener with the father immediately he was born and when he predeceases the father or grandfather the widow of the son or grandson will get his share under sub-s. (2). But if it is the father's self-acquired property, the predeceased son or grandson would have acquired no right and therefore his widow would be left without any claim to the property. That case is accordingly met by the proviso to sub-s. (1) of S. 3; and this explains why this case is dealt with as a proviso to that subsection. Here again, the expression "inherit in like manner as a son" in the proviso is significant. That is apposite to a devolution of the father's self-acquired property; but, in respect of the other two kinds of property, there will be no inheritance by the son as he would have become a coparcener with the father immediately he was born.

It is true that, on the above view, the plaintiff in the present case will derive no benefit from the Act, though she happens to be the widow of a predeceased son. But that is due to the circumstance that her husband died before the passing of the Act. Other cases of hardship which, for the same reason, the Act may be unable to remedy, may be easily imagined. If A and B were undivided brothers and the family property passed by survivorship to B, on the death of A leaving a widow, B would be the last surviving coparcener with the possibility of A's widow taking a boy in adoption. According to the recent decision of the Judicial Committee in 70 I. A. 232,⁵ A's widow can exercise her power to adopt, even after the family property had devolved on B's widow by inheritance; the result of her so adopting a boy would be to divest B's widow of the whole estate. Even if the adoption should take place after the Act had come into operation, B's widow could derive no benefit by relying upon sub-s. (1) of S. 3. The only possibility of calling the Act to her aid is by the application of sub-s. (2) of S. 3, if a double fiction could be imported so as to justify the assumption not only that the joint family was being continued by the adopted boy but that B must be deemed to have died after the adoption. On this assumption, B's widow could retain a half of the estate as against the adopted son of A, only if B's ownership could be described as an "interest in joint family property". The possibility of such varying

consequences cannot be allowed to control the natural and reasonable interpretation of the Act. It is *prima facie* prospective and its proper construction and operation must be determined with reference to conditions and contingencies likely to arise after its commencement, because these alone could presumably have been within its contemplation.

The following illustration will show that the construction contended for on behalf of the plaintiff may lead to an inequitable result which is hardly likely to have been contemplated by the Legislature. When a son is born to A, the owner of a share obtained on partition, the father and the son will become coparceners and if the son should predecease the father, the son's widow would get his share under sub-s. (2) of S. 3. If, at this stage, the father-in-law and the daughter-in-law should divide the property, the father-in-law would be the owner of his share. Should this share be treated as "separate property" within the meaning of sub-s. (1) of S. 3, the result might be that, at the father-in-law's death, his widow would have to share it again with the predeceased son's widow notwithstanding the fact that the latter had already taken a half share as representing her husband. If it is not treated as separate property within the meaning of the Act, the father-in-law's widow would succeed to her husband's share under the ordinary Hindu law. There is no force in the criticism that such a construction assumes that the legislation has not dealt with all conceivable cases. Obviously, that was not the purpose of the measure. As already explained, it is only a limited measure attempting to give relief in certain cases where it was considered that the existing law involved a hardship.

The difference between the position of a person owning self-acquired property and that of a person who happens to be the holder of property as a sole surviving coparcener for the time being is shown by the fact that in the latter case his right as full owner will be reduced to that of a coparcener, the moment an adoption is made by a predeceased coparcener's widow. In the words of the Judicial Committee in 70 I. A. 232,⁵ this possibility challenges the character of the surviving coparcener's right as an absolute right and creates qualifications which impair its completeness. It is an interest liable to fluctuate both during his life-time and even after his death. According to the observations of the Nagpur High Court, quoted with approval by their Lordships, the property held by a person, who is a sole surviving coparcener, has the potentiality of becoming joint family property at any moment so long as there is a widow entitled to add a male member to the

5. ('43) 30 A. I. R. 1943 P. C. 196 : I. L. R. (1944) Bom. 116 : I. L. R. (1942) Kar. P. C. 28 : 70 I. A. 232 : 210 I. C. 369 (P. C.), *Anant Bhikkappa v. Shankar Ramchandra*.

family by adoption. On behalf of the appellant reliance was placed on a sentence in the judgment of the Judicial Committee in 9 M. I. A. 539⁶ at p. 610 to the effect that "what is divided goes as separate property." This sentence must be understood in the light of the observation on the preceding page where speaking of a case where a person has male issue, their Lordships contrast "separate property" with "family property"—where separate property must clearly mean self-acquired property—and lower down they add "when property belonging in common to a united Hindu family has been divided, the divided shares go in the general course of descent of separate property." In this last sentence too, separate property evidently refers to self-acquired property and the sentence only lays down that the divided share will follow the same line of descent as self-acquired property. I am accordingly of the opinion that property held by Arunachala as the last surviving coparcener of a joint family cannot be regarded as "separate property" within the meaning of S. 3 (1) of Act 18 of 1937 and that the plaintiff is not therefore entitled to claim the benefit of the Act.

Turning now to the appellant's contentions, I am of the opinion that in respect of one of them, viz., that relating to the moveable assets of the deceased abroad, she would be entitled to succeed, if only she could claim the benefit of Act 18 of 1937. It has not been disputed that the distribution of the distributable residue of the moveables, wherever they may be situate, is ordinarily governed by the law of the domicile of the owner at the time of his death (Dicey's Conflict of Laws, R. 192). It can make no difference for this purpose whether the law of the domicile rests on common law or on statute law. It may be that the collection and administration of these assets will, in some measure, be governed by the law of their locality. But the ultimate succession thereto and the distribution thereof will be governed by the law of the domicile: see (1883) 8 A. C. 82.⁷ The learned Judges of the High Court do not seem to have doubted the correctness of this proposition; but, in applying it to the case before them, they have placed a limited construction on Act 18 of 1937 and held that it effected a change in the general Hindu law only in respect of properties lying within British India, whether they be moveable or immovable. Two reasons have been given in support of this limited construction of the Act. The first is based on the principle that a Legislature must be presumed

to deal only with matters within its jurisdiction. With all respect, I am unable to see any scope for the application of this principle here. So far as moveable properties are concerned, it is not the legislation that directly acts on them. It only declares the law governing the person. The succession to the moveables follows that law because it is the law of the person's domicile. Counsel for the respondents referred in this connexion to 1933 A. C. 710.⁸ The observations in that judgment must be understood in the light of the distinction explained in (1883) 8 A. C. 82⁷ between the law relating to succession and the law relating to taxation. The maxim *mobilia sequuntur personam* which is generally relevant to the former has ordinarily no place in the latter.

The second reason given in the judgment of the High Court is that even as a matter of construction, apart from presumption, the language of Act 18 of 1937 shows an intention to legislate only with regard to properties situate in British India; and the learned Judges rely on sub-s. (2) of S. 1 which provides that the Act "extends to the whole of British India including British Baluchistan and Sonthal parganas and excluding Burma." They point out that when the Act was passed by the Legislative Assembly, Burma was part of British India but it was nevertheless excluded and the logical inference, according to them, is that the legislation was not intended to apply even to Burma. This line of reasoning ignores the fact that as early as July 1936, an Order-in-Council (The Government of India Commencement and Transitory Provision Order, 1936) had fixed 1st April 1937 as the date for the commencement of the new constitution which separated Burma from British India and that it would have been idle for the Legislature, with knowledge of that fact, to attempt to include Burma in the legislation. Under the General Clauses Act, as it originally stood, the expression "British India" would have included Burma and therefore the draftsman excluded Burma when he used the expression "British India" in sub-s. (2) of S. 1. The result of that exclusion would no doubt be that a Hindu domiciled in Burma would not be governed by the Act. But that is different from saying that a Hindu domiciled in British India would be governed by the Act only in respect of properties situate within British India. The position as regards immovable property is different because, according to the well-established rule of International law, the law of domicile does not furnish the rule of succession to immovable property.

6. (1861-63) 9 M. I. A. 539 (P.C.), Katamma Nachiar v. Rajah of Shivagunga.

7. (1883) 8 A. C. 82, Blackwood v. The Queen.

8. (1933) 1933 A. C. 710, Provincial Treasurer of Alberta v. Carr.

In the view above stated, a further point was raised on behalf of the respondents with reference to the quantum of share which the plaintiff could claim in the foreign moveables. Section 3 (1) of Act 18 of 1937 uses the word "widow" in the singular and provides that the property shall "devolve upon his widow along with his lineal descendants" In the present case, the deceased left two widows. It was contended that each of the widows must be held entitled to an equal share with a son or a son's widow and that therefore the plaintiff would be entitled only to a third share. An Amending Act, 11 of 1938, realised the ambiguity arising out of the use of the singular and it substituted for the original provision a clause to the effect that the widow "or if there is more than one widow, all his widows together" shall be entitled to the same share as a son. This Act 11 of 1938 was expressly made retrospective to have effect as if it had come into force on the day the Act 18 of 1937 became law. Counsel for respondents contended that the law of domicile for purposes of succession must be understood to be the law of domicile "as it existed at the date of the death of the propositus" . . . (Halsbury's Laws of England, title 'succession,' vol. VI, para. 296; (1872) 2 P. & D. 268;⁹ (1895) 64 L. J. Ch. 521.¹⁰) . . . and that as Act 11 of 1938 became law only some months after the death of Arunachala the provision for its retrospective operation cannot affect the rule of succession in respect of foreign moveables. It might have been necessary to examine this argument if the provision made in Act 11 of 1938 had effected a change in the law as it stood under Act 18 of 1937. I am, however, of the opinion that the language even of Act 18 of 1937 must, on its true interpretation, be given the same meaning as the provision in Act 11 of 1938 bears. Under the Hindu law, the widows of a person inherit as a body or as a unit and not as tenants-in-common, though, after they have so inherited, they may, for convenience of enjoyment, divide the property between themselves. Interpreting Act 18 of 1937 in the light of this principle, the intention of the Legislature must have been to give to the widows, where there is more than one, a unit of share along with the sons. That this must have been the intention will become clear if we turn to the proviso, which enacts that the widow of a predeceased son shall inherit in like manner as a son. Where a predeceased son has left more than one widow, it could hardly have been intended that these widows should claim a *per capita* division with the

other sons of their father-in-law. Such a division would subject the shares of the other sons to diminution by the mere accident of their brother's death. In this view, the provision in Act 11 of 1938 is only in the nature of an explanatory enactment and there will be no justification for making any difference between the foreign moveables and the properties in British India, so far as the quantum of the plaintiff's share is concerned.

The other contention of the appellant relates to her claim to succeed to the trusteeship held by the deceased, individually or jointly with others, in respect of numerous religious and charitable trusts. On this question, I am inclined to agree with the view taken by the High Court as well as by the trial Court that Act 18 of 1937 was intended to apply only to property beneficially owned by the propositus and not to anything in the nature of a trusteeship. The Hindu law has no doubt regarded trusteeship as "property" for certain purposes and it has long been established that the title to the management of religious and charitable trusts follows the line of inheritance from the founder, where no other arrangement has been made therefor. In the present case, we have little or no evidence as to the terms of the foundation in respect of any of the trusts managed by the deceased. Counsel for the appellant drew our attention by way of illustration to four documents (Exs. 3, 4, 5 and 6); but, even in these instances, it appears from the documents themselves, that in respect of some of them Arunachala was not himself the founder of the trust. Not much, however, turns upon this, because even these documents only provide for management by "his heirs." It does not seem reasonable to construe the reference to "his heirs" as words not of devolution but of direct gift to them. The question is whether the heirs are to be determined according to the ordinary Hindu law or according to the provisions of Act 18 of 1937. In view of the limited objective of the Act, the ordinary rule of Hindu law must furnish the rule of succession. That the Act was intended to deal only with private property is shown by the provision in sub-s. (3) of S. 3 to the effect that the interest devolving on a Hindu widow under the preceding sub-sections shall be only the limited interest known as a woman's estate. This provision will be appropriate enough in relation to private property where the woman's estate is different from the interest taken by a male heir. But in respect of trusteeship or other similar office, the law makes no difference between the interest taken by a male heir and the interest taken by a female heir.

Spens C. J. — The facts in this case have been fully stated in the judgment of my

9. (1872) 2 P. & D. 268, *Lynch v. Paraguay Provisional Government*.

10. (1895) 64 L. J. Ch. 521, *In re Aganoor's Trust*.

brother, Varadachariar and I do not propose to repeat them. In this Court a very potent attack was made on behalf of the respondents against the validity of the Hindu Women's Rights to Property Act, 1937 (Act 18 of 1937), based upon the dates upon which the Act as a Bill was passed through the two Chambers respectively of the Indian Legislature and at which the assent to the Bill was declared by the Governor-General. The material dates are: the Bill was passed by the Legislative Assembly on 4th February 1937, it was passed by the Council of State, I understand, on 4th April 1937, and the Governor-General declared his assent thereto on 14th April 1937. The enactment was duly published in the Gazette on 17th April 1937. By virtue of cl. (3), Government of India (Commencement and Transitory Provisions) Order, 1936, the provisions of the Government of India Act, 1935, other than those of Part II thereof and certain other provisions not material to this case, had come into force on 1st April 1937. It was accordingly strenuously argued that as the Bill had neither been passed by both Chambers and assented to by the Governor-General before 1st April 1937, nor had been passed by both Chambers and assented to by the Governor-General after 1st April 1937, it was not a valid enactment under the provisions of the Constitution Act.

Before considering in more detail the arguments advanced before us in support of this attack, I would mention that though the Subordinate Judge dealt at some length with the suggestion of invalidity, it was apparently thought when the case was before him that both Chambers had passed the Bill before 1st April 1937, and that it was only the declaration of the assent of the Governor-General that had occurred after 1st April 1937. In these circumstances, the Subordinate Judge found himself able to support the validity of the Act. The substantial arguments hereafter further referred to of lack of agreement between the two Chambers based on the fact that the Council of State also passed the Bill after 1st April 1937, were not raised before him. When the case came before the High Court, this Court had already delivered its opinion on the Special Reference made to it by the Governor-General under S. 213, Constitution Act, on the Act in question, in the course of which consideration was given to this aspect of the validity of the Act: *see* (1941) F. C. R. 12¹¹ at pp. 25 and 26. The High Court contented itself with adopting without discussion the

views in favour of validity expressed by this Court in the said opinion. That opinion is not technically binding on the High Court, nor is it binding on this Court. Any opinion of this Court given upon a reference under S. 213 can properly be reconsidered at any time by this Court in any litigation coming before it and should be so reconsidered on the proper request of any party, however much respect for the learned Judges responsible for an opinion and a desire to secure continuity and certainty in the pronouncements of this Court may make a member of this Court hesitate to differ.

Implicit in the argument of those appearing for the respondents on this point of the validity of the Act was the assumption that although an enactment of the Indian Legislature (which by S. 63 of Sch. 9 to the Constitution Act, is defined as consisting of "the Governor-General and two Chambers, the Council of State and the Legislative Assembly"), be duly published in the Gazette with the date on which the Governor-General has declared his assent, from which it is to be presumed that a Bill in that form has been previously duly passed by both the Chambers of the Indian Legislature, it is open to this Court to inquire into the proceedings of the Indian Legislature, to ascertain whether and when a Bill in that form passed the respective Chambers and subsequently received the assent of the Governor-General. Realising how invidious always is the jurisdiction of any Court to inquire into the proceedings of a Legislature, I felt unable to act upon any such assumption and required to be satisfied that this Court could properly go behind the scenes and inquire into the history inside the Indian Legislature of the Bill to which the Governor-General had declared his assent on 14th April 1937. Sir Erskine May in a passage in his *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (Edn. 13, commencing at page 441) considers at some length the effect on an Act of Parliament of irregularities, contrary to the admitted requirements in procedure for a valid enactment of Parliament, occurring either in connexion with the passage of a Bill through either House or in connexion with the giving of the Royal Assent. The learned author points out that in modern times there has been no decision of any Court. Parliament with a wisdom and foresight, (which might, I venture to think, have with advantage before now been imitated by the Indian Legislature in connexion with the Hindu Women's Rights to Property Act, 1937), has always, as soon as any irregularity in procedure, which might conceivably be made the basis of a

11. (41) 28 A. I. R. 1941 F. C. 72 : 1941 F. C. R. 12 : I. L. R. (1941) Kar. F. C. 148 : 194 I. C. 357 (F. C.), In the matter of Hindu Women's Rights to Property Act, 1937.

plea of invalidity of an enactment, has been brought to its notice, promptly proceeded by further Act of Parliament to re-enact or validate the provisions of the doubtful enactment, and so has prevented the matter being litigated in the Courts, and becoming the possible cause of differences between the Legislature and the Courts. This passage obviously implies that otherwise a Court might well investigate the alleged irregularity and feel bound to hold the enactment invalid. To that extent therefore it seems proper for a Court to look into the details of the actual procedure of enactment by a Legislature.

Moreover, before I committed myself to investigate the alleged invalidity of the Hindu Women's Rights to Property Act, 1937, I also required to be satisfied that the subsequent enactment of the Hindu Women's Rights to Property (Amendment) Act, 1938, against the validity of which, so far as the procedure of the Legislature was concerned, no allegation was or could be made, did not operate to cure any invalidity that might attach to the manner in which the 1937 Act had been enacted. After discussion, I was convinced by the argument of counsel for respondent 2 that the Act could not be construed as a re-enactment of the 1937 Act with retrospective effect, and that if the 1937 Act were itself invalidly enacted, only to such portions, if any, of the Amending Act of 1938 could legal effect be given as were capable of being construed as separate and independent enactment. In my judgment, the respondents were therefore justified in requiring the Court to investigate the validity of the legislative procedure in connexion with the enactment of the 1937 Act. I notice that the jurisdiction and propriety of this Court investigating the proceedings of the Legislature were discussed and considered in the Special Reference (1941) F. C. R. 12,¹¹ and the opinion of this Court then expressed strengthens my view of the jurisdiction and propriety of making an investigation in this case.

In support of the attack on the validity of the Act, counsel for the respondents developed a number of points. It was urged that 1st April 1937 was an absolute dividing line. Prior to that date the Indian Legislature was the Legislature established and functioning as such under the provisions of and with the powers conferred upon it by the then operative Government of India Act. After 1st April 1937, the Government of India Act, 1935, provided for the repeal of the material provisions of the old Constitution Act and for the establishment of a new Federal Legislature with quite new legislative powers and functions as therein set forth. It was of course true that

to cover the period prior to the establishing of Federation and the Federal Legislature some temporary transitory arrangement had to be made, and the arrangement made was the continuation for the time being of the existing Indian Legislature despite the repeal of the old Constitution Act, but the legislative powers which that Legislature exercised after 1st April 1937, were not the old powers but the new powers which the Federal Legislature would exercise as and when constituted.

Consequently, no enactment could be valid if passed by one Chamber under the old powers of the Legislature prior to 1st April 1937, and by the other Chamber and assented to by the Governor-General under the new powers conferred upon that Legislature under the Government of India Act, 1935. The Constitution Act of 1935 did not recognise any such hybrid legislation. It recognised as valid enactments of the legislation, first, laws in force in British India immediately before 1st April 1937, (S. 292) and "existing Indian law" as defined in S. 311. It recognised secondly laws made by the Federal Legislature under the powers conferred thereon by S. 99 and following sections, or by the Indian Legislature exercising such legislative powers in the transitory period under S. 316. For the first class to be valid, they had to be passed or made and in force before 1st April 1937, i.e., duly passed through both Chambers and assented to by the Governor-General before that date. Moreover cl. (9), Government of India (Commencement and Transitory Provisions) Order, 1936, indicated that to be valid such laws had also actually to be operative prior to 1st April 1937. Otherwise their validity might not be saved by S. 292 and they therefore required special enactment to give them any validity. The case of an enactment that had only passed through the Assembly before the material date was a fortiori and it must require special enactment to save it. For the second class to be valid, they had to be initiated and completely enacted under the new powers after 1st April 1937, otherwise they could not be Federal Laws. Besides the difference in legislative powers before and after 1st April 1937, the composition of the Legislature was so different, it was urged, as to make the Legislature after 1st April 1937, no longer the same Legislature as before 1st April. For this purpose the provisions of cl. (8), Government of India (Commencement and Transitory Provisions) Order 1936, were relied upon. By that clause all the members of the Council of State and of the Legislative Assembly who had been elected or nominated to represent Burma or Burma constituencies had to vacate their seats on 1st April 1937. When the Bill in

question was therefore passed by the Council of State, it was passed by the Upper Chamber of a Legislature radically different in composition to the Legislature at the time when the Lower Chamber had previously passed the Bill.

Finally, it was urged that even if it were possible for an Act of the Indian Legislature to be held to have been validly enacted under the Constitution Act when it had passed only one Chamber prior to 1st April 1937, and the passing by the second Chamber and the declaration of the assent by the Governor-General had taken place after 1st April 1937, none the less this particular Act could still not be held to have been validly enacted as the Council of State had never agreed to the same Bill as that originally passed by the Legislative Assembly. It was suggested that as prior to 1st April 1937, the Indian Legislature then had power to legislate in respect of all property, whereas subsequent to 1st April 1937, the power to legislate in respect of certain items of property, and in particular agricultural land, had become under the provisions of the Constitution Act solely within the legislative competence of the Provincial Legislature, it must be presumed that when the Legislative Assembly passed the Bill, that Assembly intended to legislate in respect of all property within its legislative competence, and that likewise when the Council of State subsequently passed the Bill, it must be presumed that it only intended to legislate in respect of property within its legislative competence or at any rate it could not be assumed that it intended to legislate in the same sense in this respect as the Legislative Assembly, and that therefore the two Chambers had never in law agreed to the same Bill, despite the wording having been the same when the Bill was passed by each Chamber.

Dealing with the last mentioned argument first, in my opinion, when a Court ascertains that a Bill has in fact been passed by both Chambers of the Indian Legislature in exactly the same words and form and has so been assented to by the Governor-General, it is impossible and improper for the Court further to investigate whether each Chamber and the Governor-General gave the same meaning and connotation to the common terms used. In this case the Court is asked to act on presumptions. But if the Court can consider presumptions it seems to me impossible to exclude cases when positive evidence might be offered. In some other case the Court might be asked to act upon allegations of fact that so many individuals voted upon some misapprehension as to the meaning of some word or words used so that no real majority was ob-

tained in favour of a Bill in one Chamber or the other. How could such an investigation be conducted? What steps could a Court properly take to obtain evidence on the matter? I can see no end to the difficulties which might arise or the conflicts with Legislatures in which Courts might become involved if the Courts ever assumed the right to investigate what meaning in fact this or that Chamber or individual members attributed to words or phrases in a Bill at the time they voted in favour of the passing of it. A similar investigation into the mind of the Governor-General at the time of declaring assent would be not less improper.

In my judgment it is not therefore permissible for a Court to investigate the actual meaning or connotation alleged to have been given to or held regarding words and phrases in Bills by individual legislators at the time a Bill is passed by the Chamber of which they are members. Nor do I think that a Court can be asked to make presumptions from the powers of the Legislature at the material dates or from any other circumstances as to the meaning or connotation given to or held regarding words or phrases in Bills by the members of Legislative Chambers who pass the Bills. The powers of the Legislature cannot, I think, be used to found any such presumptions. If a Court finds that a Bill has been passed in the same words and form by the requisite Legislative Chambers and assented to by the requisite authority, when those Chambers and that authority had legal powers of legislation and assent respectively, the Court must, in my judgment, treat it as a valid piece of legislation so far as the legislative processes are concerned and proceed to construe it as the Court considers that it should be construed, and give the meaning or connotation to the words used which the Court according to the rules of construction which it conceives as binding upon it consider ought to be given to an enactment with those words and in that form. I accordingly am not prepared to hold that this Court should presume that the Council of State and the Governor-General did not legally agree to the Bill as passed by the Legislative Assembly, and that the Act is invalid on that ground.

I turn now to the question whether by reason of cl. 8, Government of India (Commencement and Transitory Provisions) Order, 1936, the Indian Legislature, after the vacation of their seats under that clause by the members elected or nominated to represent Burma or Burma constituencies, was so radically different in composition as no longer to be the same Legislature as prior to 1st April 1937. It is obviously clear that by absence

voluntary or through illness of members, or by vacancy of seats owing to death the Indian Legislature constantly and continuously varies in composition from day to day. Neither before or after 1st April 1937, was it a requirement of the continuity of existence of the Indian Legislature that there should be elected or nominated members for all seats, still less that all elected and nominated members should be present. It follows, in my opinion, that by a proper enactment binding upon the Legislature, the compulsory vacation of some members of their seats does not and cannot ipso facto cause the continuing Legislature, less those members, to be a different Legislature in law. Indeed, the very opposite deduction, namely, that it is the same Legislature carrying on without the excluded members, seems to me to be the proper one to be drawn from the provisions in question. In my judgment this argument is not well founded.

In order to indicate the conclusions to which I have come on the remaining important and difficult points raised against the validity of the Act on behalf of the respondents, some further reference must be made to some of the material sections of the Constitution Act of 1935. It is true that by S. 321, Constitution Act, the statutory provisions under which the Indian Legislature was functioning were formally repealed. From the reference in sub-s. (b) of S. 321 it is, I think, made clear, if such were necessary, that the repeal is without prejudice to the provisions of the Interpretation Act, 1889. Simultaneously by S. 317, it was enacted that certain provisions of the existing legislation, subject to some necessary amendments consequential on the provisions of the 1935 Act, should continue to have effect notwithstanding the repeal effected by S. 321. Amongst the provisions so continued in effect and set out in Sch. 9 to the 1935 Act are a number of existing provisions relating to the Indian Legislature, including the provisions in particular of S. 63 and S. 68 of Sch. 9. These repeat and continue the existing structure of the Indian Legislature, viz., the Governor-General and the same two Chambers, and the same requirements necessary for the valid enactment of a piece of legislation by that continued Legislature. It is to be noted that in S. 63, the requirement is continued that a Bill shall not be deemed to have been passed by the Indian Legislature unless it has been agreed to by both Chambers either without amendment or with such amendments only as may be agreed to by both Chambers, and by S. 68 are continued the provisions that it is only "when a Bill has been passed by both Chambers of the Indian Legislature" that the Governor-General can exercise his power of assent and that a Bill

passed by both Chambers of the Indian Legislature shall not become an Act until the Governor-General had declared his assent thereto. It appears therefore that by virtue of S. 317 and Sch. 9 the same Indian Legislature is continued in existence after 1st April 1937, and the same procedure is continued for the valid enactment of legislation, despite the formal repeal of the old statutory provisions. So far as the provisions hitherto referred to are concerned, it would seem that the repeal of the existing legislation was expressly prevented from interrupting the continuity of the Indian Legislature and of the procedure and requirements for enacting legislation. It is a fact that the legislation in question in this case was in the words and form in which it was published in the Gazette, so passed by the Legislative Assembly and by the Council of State and assented to by the Governor-General. The prescribed requirements existing before 1st April 1937, and continued thereafter appear to have been complied with. In my judgment, the effect of S. 317 is *prima facie* to establish the uninterrupted continuation of the Indian Legislature, and its legislative procedure, notwithstanding the formal repeal of the existing legislation in S. 321. It continues the same Legislature and the same procedure for legislation. There is no break or division on 1st April 1937, by reason of the repeal. In my judgment the fact that one can also pray in aid the Interpretation Act, 1889, in construing the Constitution Act also assists. For, if the repeal might be held to affect adversely the passing of the Bill by the Assembly, as such passing was prior to the repeal, it seems to me that S. 38 (2), Interpretation Act, may well cure any possible invalidity on that score.

That takes me to the further consideration, whether the fact that when the Assembly passed the Bill it was functioning under the powers conferred upon it by the then existing legislation (S. 65 whereof, it is to be noted, is not included in Sch. 9), whereas when the Council of State passed the Bill, the Indian Legislature's powers of legislation were those given to it by the Constitution Act of 1935, affects the *prima facie* conclusions above. In my judgment they do not. It seems to me that the powers of a Legislature, that is to say, the field within which it is authorised to legislate, may vary from time to time without in any way affecting the validity of the enacting processes of that Legislature. Such variation may well result in a Court having to hold legislation *ultra vires* in part or even in whole, but that, it seems to me, is a different matter from holding that legislation is invalidly enacted. What the powers of a Legislature or the area of authorised legislation are

whilst a Bill is going through the different preliminary stages of legislation, cannot, in my view, affect the validity of the process of enactment. The area in which a Legislature is authorised to legislate only comes to be examined if and when the enacting operations are complete, should there be any question of the Act being ultra vires, and the material date for the examination of the powers or area of authorised legislation for this purpose is in my judgment the date when the Act becomes law, in this case, the date when the Governor-General declared his assent. The Constitution Act does no doubt cause a very substantial break as regards the legislative powers of the Indian Legislature, between those which it possessed before and those which it possessed after 1st April 1937. But for laws of the Indian Legislature to be validly enacted, it is not in my judgment necessary that the Legislature should have had the same powers and the same authorised field of legislation throughout all the stages of the legislation. So far as validity of enactment is concerned, the vital question is in my view not what were the powers of the Legislature at the different stages, but was the Legislature the same at all stages and have the statutory requirements relating to the processes of enactment been duly complied with. Hence it follows, in my judgment, that for laws of the Indian Legislature it was not necessary that they should be completely enacted through all their stages either wholly before or wholly after 1st April 1937. The transitory provisions continued the Legislature as the same and the enacting processes as the same. As these provisions have, in my judgment, been complied with by the Indian Legislature in the case of the Act challenged in this case, it follows that it was not in my judgment invalidly enacted. Neither is the suggestion that as the Act was neither existing Indian law on 1st April 1937, nor wholly enacted as a Federal law after that date, it is therefore invalid, I think, sound, nor I do agree with the argument based on cl. (9) of the Government of India (Commencement and Transitory Provisions) Order, 1936. The first suggestion in my view really assumes that after 1st April 1937, the Indian Legislature could only validly enact laws of the Indian Legislature to the same extent and in the same manner as the Federal Legislature, had it been in existence, namely, by passing them through all their legislative stages after 1st April 1937. This obvious requirement in respect of laws to be enacted by the Federal Legislature follows from the fact that clearly the Federal Legislature must be a totally different Legislature from the Indian Legislature. But if the Indian Legislature is the same

after as before 1st April 1937, the position may well be, as in my view it is, very different as regards laws of the Indian Legislature to what it might be in respect of laws of the Federal Legislature. As regards cl. (9) of the Order of 1936, that clause seems to me directed to quite another point, namely, a possible very inconvenient construction of S. 292. It seems to me to have been drafted on the assumption that it might be held that an existing law of the Indian Legislature to be saved by S. 292 must not only have been enacted before but must also have been operative before 1st April 1937. Or it may be that it was thought desirable to deal directly with a type of laws in force on 1st April 1937, namely, those only to come into operation on or after 1st April 1937, which might seriously interfere with the legislative scheme of the Constitution Act. In any event before 1st April 1937, it was itself repealed by cl. (9), India and Burma (Transitory Provisions) Order, 1937. In the circumstances I have not been able to get assistance from this argument.

In the result, in my judgment, the Hindu Women's Rights to Property Act, 1937, was validly enacted by the Indian Legislature. What is its proper scope and effect is an entirely different question. It has been argued that it is wholly invalid owing to the difficulty of construing the word 'property' in the light of the powers of the Indian Legislature as the result of the passing of the Constitution Act. Alternatively, it has been argued that any such difficulty can and should be met by applying the principles in (1891) A. C. 455.⁴ The latter argument prevailed in this Court when the matter came before it on the Special Reference. I respectfully concur in the view which the Court then took and I am unable to hold that the Act is wholly ultra vires and invalid on any such ground. I would only add that I have had ample opportunity of reading and considering the judgment just delivered by my brother Varadachariar. With his findings and conclusions on all the other points raised in this case and dealt with by him in his judgment, I respectfully agree and do not desire to add anything further.

Zafrulla Khan J. — The validity of Act 18 of 1937 was considered and pronounced upon by this Court in an advisory opinion delivered on 22nd April 1941.¹¹ Before delivering its opinion, the Court considered statements filed on behalf of the Government of India and seven of the Provinces and heard the Advocate-General of India and the Advocates-General of Madras and the United Provinces. The position taken up by the three Advocates-General was that the Act was for various reasons invalid, but that if it was to be treated

as a valid piece of legislation, it could not operate to regulate succession to agricultural land in the Governors' provinces. The Court pronounced the Act to be valid but declared that it did not operate to regulate succession to agricultural land in the Governors' provinces.

Before us the validity of the Act was attacked on behalf of the respondents on two main grounds. The first ground was developed along the following lines. The Act was passed by the Legislative Assembly on 4th February 1937, before Part 3, Constitution Act, came into operation. It was passed by the Council of State on 6th April, and received the Governor-General's assent on 14th April 1937, Part 3, Constitution Act, having in the meantime come into operation. (These dates are taken from the reference made by the Governor-General relating to the Act under S. 213, Constitution Act). It was clearly therefore not an "existing Indian law" which is defined in S. 311, Constitution Act, as "any law, ordinance, order, bye-law, rule or regulation, passed or made before the commencement of Part 3 of this Act by any Legislature, etc." Much less was it a "law in force in British India immediately before the commencement of Part 3 of this Act" within the meaning of S. 292 of that Act. The powers of the Indian Legislature to make laws in pursuance of S. 65, Government of India Act, 1919, came to an end on 31st March 1937. Henceforth legislation under the scheme of the Constitution Act could either be Provincial or Federal. Federal laws could only be passed by the Federal Legislature. By 1st April 1937, the Federal Legislature had not yet been set up. It was therefore necessary to make some other provision for the making of Federal laws during the period of transition. Sections 316 and 317 in Part 13, Constitution Act, made that provision. Section 312 prescribes that the provisions of Part 13 shall apply with respect to the period elapsing between the commencement of Part 3 of the Act (1st April 1937), and the establishment of the Federation.

Section 316 says that the powers conferred by the provisions of the Constitution Act for the time being in force on the Federal Legislature shall be exercisable by the Indian Legislature, and that accordingly references in those provisions to the Federal Legislature, and Federal laws, shall be construed as references to the Indian Legislature and laws of the Indian Legislature. These powers became operative only on 1st April 1937, and could not be exercised before that date. Section 317 enacts that the provisions of the Government of India Act, 1919, set out with amend-

ments in Sch. 9 shall continue to have effect notwithstanding the repeal of that Act by the Constitution Act. So far as the Indian Legislature is concerned, the provisions set out in Sch. 9 prescribe the constitution of the two Chambers of the Legislature and the procedure to be adopted in passing legislation. Section 65 of the Act of 1919 which conferred upon the Indian Legislature the power to legislate was omitted in Sch. 9. This was an inevitable consequence of the division of the field of legislation between the Provinces and the Centre carried into effect by Ss. 99 and 100, Constitution Act, read with the three Lists in Sch. 7. The broad result of the combined operation of Ss. 316 and 317 read with Sch. 9 was that the Indian Legislature was to be continued during the transition period and was to make laws in conformity with the procedure laid down in the Act of 1919. During that period (that is to say, beginning with 1st April 1937, but not earlier) it was competent to exercise the powers and only the powers conferred upon the Federal Legislature by the Constitution Act.

The Legislative Assembly, in exercise of the powers conferred upon it by S. 65 of the Act of 1919, passed the Hindu Women's Rights to Property Bill on 4th February 1937. Had this Bill been agreed to by the Council of State and received the assent of the Governor-General before 1st April 1937, it would have become an "existing Indian law" within the meaning of S. 311, and had it been put in force before that date, it would have been a "law in force in British India immediately before the commencement of Part 3 of this Act," within the meaning of S. 292, Constitution Act, and would, by virtue of that section, have continued "in force in British India until altered, repealed or amended by a competent Legislature or other competent authority." A Bill passed by the Legislative Assembly in exercise of the powers conferred by S. 65 of the Act of 1919 could become law only if it was agreed to by the Council of State functioning under the same section. The Council, exercising the powers conferred upon it by the Constitution Act, was not competent to agree to a Bill passed by the Legislative Assembly functioning under S. 65 of the Act of 1919. Section 63 of the Act of 1919 which was continued in force in Sch. 9 provides that a Bill shall not be deemed to have been passed by the Indian Legislature unless it has been agreed to by both Chambers, either without amendment or with such amendments only as may be agreed to by both Chambers. The Bill passed by the Legislative Assembly on 4th February 1937 did not become an "existing Indian law" inasmuch as

it was not agreed to by the Council of State while it was still invested with powers under S. 65 of the Act of 1919. The Bill passed by the Council of State on 6th April 1937 could not become a Federal law as the Legislative Assembly had not agreed to it in exercise of the powers conferred upon it by the Constitution Act. Therefore, it was contended, the Act was not valid. The appellant's reply was that the effect of S. 317 read with Sch. 9 was that the provisions set out in that schedule were never repealed and continued in force without a break. Consequently, the Indian Legislature also continued to function without a break, subject only to a modification of its powers by virtue of the repeal of S. 65 of the Act of 1919 and its replacement by Ss. 99 and 100 read with Lists 1, 2 and 3 of Sch. 7 to the Constitution Act. It was contended that all that was necessary for the valid passing of a Bill by the Indian Legislature was that the Bill should be agreed to by both Chambers, either without amendment or with such amendments only as may be agreed to by both Chambers. The Hindu Women's Rights to Property Act was passed by the Legislative Assembly and agreed to by the Council of State without amendment. This being established, it was not within the province of a Court of law to investigate the matter any further. The extent of the operation of the Act was a matter relating to construction and was not a question affecting the validity of the Act. I am unable to accept the contention that the Court is debarred from investigating whether a piece of legislation, which appears on the face of it to have been agreed to by both Chambers of the Indian Legislature without amendment and to have received the assent of the Governor-General, was or was not validly enacted by reason of any alleged lack of power or capacity in one or both Chambers to function effectively. The line of argument summarised above does not raise a mere matter of procedure regulating proceedings in either Chamber of the Legislature. It calls in question the very capacity of the Legislature to function. The determination of the question raised does not depend upon a construction of the Rules of Business or Standing Orders of the Chambers but upon the interpretation of and the effect to be given to provisions of the Constitution Act from which the Legislature derives its power to legislate.

Gwyer C. J., in delivering the opinion of the Court in (1941) F. C. R. 12¹¹ repelled the contention that the validity of the Act was open to objection on the ground that it was introduced into the Legislature and passed by the Assembly before Part 3, Constitution Act, came into

force.¹¹ He opined that the effect of Ss. 316 and 317 read with Sch. 9 was

"that the Indian Legislature which was in existence immediately before the coming into force of Part 3 of the Act was continued in existence after that date, and was in all respects the same Legislature, though its legislative powers were no longer as extensive as they had previously been."

He went on to observe:

"In the opinion of this Court, therefore, it is immaterial that the powers of the Legislature changed during the passage of the Bill from the Legislative Assembly to the Council of State. The only date with which the Court is concerned is 14th April 1937, the date on which the Governor-General's assent was given; and the question whether the Act was or was not within the competence of the Legislature must be determined with reference to that date and to none other."

It is true that subject to the elected and nominated members representing Burma or Burma constituencies vacating their seats as from 1st April 1937 [Para. 8, Government of India (Commencement and Transitory Provisions) Order, 1936], the Indian Legislature that continued in existence after the commencement of Part 3, Constitution Act, was in respect of its personnel the same Legislature which was in existence immediately before that date. But, with great respect, I am unable to agree that it was "in all respects the same Legislature, though its legislative powers were no longer as extensive as they had previously been," if by this it is meant that the only difference that the repeal of S. 65 of the Act of 1919 and the coming into force of Ss. 99, 100, 316, 317 and Lists 1, 2 and 3 of Sch. 7 to the Constitution Act, made was that the powers of the Indian Legislature suffered modifications in certain directions. In my judgment the effect of the repeal of S. 65 of the Act of 1919 was that the Indian Legislature was divested of all power to legislate on any subject whatever and by virtue of the coming into operation of Ss. 316 and 317, Constitution Act, it was immediately invested with power to legislate in accordance with the provisions of the Constitution Act. If it had been a case only of a modification of legislative powers, S. 317 would have provided for the continuance in force of S. 65 of the Act of 1919, subject to the desired modifications. That course was not adopted as the whole scheme of the Constitution based on the Act of 1919 was abandoned and a new scheme was adopted which made a total departure from the scheme of allocation of legislative powers under the Act of 1919 and substituted in its place something organically and fundamentally different.

Under the Act of 1919 the Indian Legislature had plenary powers of legislation over the whole field; provincial powers of legislation being, if one might so put it, a matter of grace, provision for which was made by

Devolution Rules promulgated under S. 45A of that Act. By virtue of S. 65 the Indian Legislature had power to make laws for all persons, for all Courts, and for all places and things, within British India; and for all subjects of His Majesty and servants of the Crown within any part of India, and for all native Indian subjects of His Majesty without and beyond as well as within British India, and for the Government of officers, soldiers, airmen and followers in His Majesty's Indian forces wherever serving in so far as they were not subject to the Army Act or the Air Force Act; and for all persons employed or serving in or belonging to any naval forces raised by the Governor-General in Council, wherever serving, in so far as they were not subject to the Naval Discipline Act; and for repealing or altering any laws which for the time being were in force in any part of British India or applied to persons for whom the Indian Legislature had powers to make laws. This was radically different from the scheme ushered in by the Constitution Act. Broadly stated that scheme is that during the transition period the Indian Legislature may make laws for the whole or any part of British India with respect only to any of the matters enumerated in the Federal and Concurrent Legislative Lists, and subject to this power, a Provincial Legislature may make laws for the Province or any part thereof with respect to any of the matters enumerated in the Concurrent and Provincial Legislative Lists. The Indian Legislature has also power to make laws with respect to matters enumerated in the Provincial Legislative List except for a province or any part thereof.

A comparison of the two schemes of legislative powers set out in the Act of 1919 and the Constitution Act, makes it quite clear that after the commencement of Part 3 of the latter Act, it would have been extremely inconvenient, if not indeed altogether impossible, to continue S. 65 of the former Act in force during the transition period subject only to modifications. The operation of that section was, therefore, altogether terminated with the greater part of the rest of the Act and its place was taken by something new and entirely different.

In some respects (e.g. with reference to repeal, amendment or modification of certain types of Parliamentary legislation) the legislative powers of the Indian Legislature during the transition period are more extensive than they were prior to 1st April 1937. Except with regard to a province or any part thereof, they still cover the whole field of legislation, but so far as the Governors' provinces are concerned they are, except during an emergency, limited

to legislation with respect to matters enumerated in the Federal and Concurrent Legislative Lists.

That the powers conferred by the Constitution Act on the Federal Legislature which were made exercisable by the Indian Legislature by S. 316 were intended to be exercised only after 1st April 1937, and that the expression "laws of the Indian Legislature" in the latter part of that section meant laws that were to be enacted by the Indian Legislature in future while functioning in lieu of the Federal Legislature, is clear on the language of the section itself but was made clearer still by Sulaiman and Varadachariar JJ. in the judgments delivered by them in 1940 F. C. R. 188.³ Sulaiman J. there observed :

"The expression 'the powers . . . shall be exercisable, etc.,' obviously implies the exercise of such powers in the future. That has no reference to Acts passed previously in the exercise of powers that existed before the Act came into force, for they come within the category 'existing Indian law'. It is obvious that 'the powers conferred by the provisions of this Act' cannot 'be exercisable by the Indian Legislature' unless the occasion arises after the Act has come into force. It follows that the first portion of S. 316 necessarily and unmistakably refers to the Acts which are to be passed thereafter. The second portion begins with the words 'and accordingly.' The significance of these words is that the second portion of S. 316 is consequential, that is to say, is the result of the exercise of the powers conferred by the provisions of this Act. So that it again follows that this latter provision also must refer to the laws of the Indian Legislature which in future come to be enacted by the Indian Legislature, in exercise of the powers conferred by this Act on such Legislature."

Varadachariar J. said :

"But as contended by the learned Advocate-General of Madras, the expression 'federal law' would prima facie seem, on the wording of S. 316, only to comprehend legislation passed by the Indian Legislature after the Government of India Act of 1935 came into operation and not earlier enactments of the Central Legislature, like the Negotiable Instruments Act. The use of the word 'accordingly' in S. 316 suggests that the second part of the first paragraph is consequential upon the first and as the first part clearly refers to the transition period — between the introduction of provincial autonomy and the establishment of the Federation — it would seem to follow that the expression 'laws of the Indian Legislature' in the second part refers to the laws passed by the Indian Legislature, while functioning as the 'Federal Legislature' during the transition period."

Could it be validly contended that Act 18 of 1937 was passed by the Indian Legislature, while functioning as the Federal Legislature during the transition period because it was passed by one Chamber of that Legislature during the transition period? The passing of a law by a Legislature must mean its passing by both Chambers of the Legislature, if the Legislature is composed of two Chambers. This Act was not passed by the Legislative Assembly while functioning as a Chamber of

the Indian Legislature during the transition period. It was, therefore, not passed by the Indian Legislature while functioning during the transition period. Section 38 (2) (b), Interpretation Act, 1889* was sought to be prayed in aid in support of the contention that the Bill passed by the Assembly in February 1937 could be validly enacted into law by its being passed by the Council of State in April 1937 and receiving the Governor-General's assent thereafter. Section 38 (2) (b) runs as follows :

"Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed."

I doubt whether the expression "anything duly done" in the sub-section was meant to include a Bill passed by one Chamber of a Legislature and awaiting consideration by the other. "Anything duly done" must mean some action taken and completed in pursuance of the provisions of the repealed enactment. Assuming that the expression might properly include within its purview a Bill passed by one Chamber of a Legislature, I am unable to appreciate the argument that the sub-section somehow operates to invest the other Chamber which has not yet agreed to the Bill with power to function in respect of the Bill as if it was still governed by the repealed enactment or enables it to treat the Bill as if it had been passed by the first Chamber in exercise of powers conferred by the repealing enactment which powers became exercisable only after the date on which the first Chamber had passed the Bill. If by virtue of S. 316, a Federal law means a law passed by the Indian Legislature while functioning as the Federal Legislature during the transition period, it must be passed by the Assembly while functioning as a Chamber of the Federal Legislature during the transition period and must be agreed to by the Council of State, also while functioning as a Chamber of the Federal Legislature during the transition period, or vice versa. The repeal of the Act of 1919 may, by virtue of S. 38 (2) (b), Interpretation Act, have left unaffected a Bill passed by the Assembly, while functioning under S. 65 of that Act, but, in my view, the Council of State had as a consequence of the repeal lost the power to convert such a Bill into a Federal law by agreeing to it during the transition period. That Parliament could not by enacting ss. 316 and 317, Constitution Act, have intended that a Federal law may be validly made by being passed by one Chamber of the Indian Legislature while functioning under

S. 65 of the Act of 1919 and by its being agreed to by the other Chamber while functioning as one of the Chambers of the Federal Legislature during the transition period, is illustrated by the difficulties with which the Council of State found itself confronted when it was called upon to deal with this particular Bill.

When the Legislative Assembly took the bill into consideration and passed it, it had power to make laws for all persons, for all Courts and for all places and things within British India. It passed the bill in a form in which it was perfectly legitimate for that Chamber to pass it intending that its provisions should have full force and effect in respect of all descriptions of property (including agricultural land). Before the Council of State could pass the Bill, both the Assembly and the Council of State had lost the power to legislate with respect to succession to agricultural land. The Council of State could not take upon itself to decide what the Assembly would have wished to do in the circumstances. It would be a matter of conjecture whether the Assembly would have desired to pass the Bill if it was to be inoperative as regards agricultural land. If the Council had amended the Bill so as to exclude succession to agricultural land from its purview, the Assembly might have refused to agree to the amendment on the ground that it would defeat the main purpose of the Bill. If the Council were to pass the Bill without verbal amendment (the course which it actually adopted) the validity of the Bill might become open to serious question on the ground that the Council had not agreed to the Bill as passed by the Assembly inasmuch as by agreeing to the word "property" in the Bill it could not mean and, therefore, did not mean, anything more than "property, excluding agricultural land."

Not only had the Council of State on 6th April 1937, no power to convert by its agreement into a Federal law a Bill that had been passed by the Assembly while functioning under S. 65 of the Act of 1919 before the transition period, it had clearly no power at all to agree to the Hindu Women's Rights to Property Bill as passed by the Assembly however much it might have desired to do so, inasmuch as its power to legislate under the Constitution Act did not include power to legislate with respect to succession to agricultural land—a matter which had been expressly and validly included by the Assembly within the purview of the Bill. The Council had not the power to pass the Bill as it came before it; it could pass it only by adopting an amendment which would confine the operation of the Bill to "property, other than agricultural land," in which case it would be necessary for

* (52 & 53 Vict. c. 63.)

the Bill to go back to the Assembly for securing its agreement to the amendment. Parliament could not be presumed to have intended to call upon either Chamber of the Legislature to solve such a conundrum. In my judgment, therefore, Act 18 of 1937 is not a valid piece of legislation. It is not an "existing Indian law" inasmuch as it was not made before the commencement of Part 3, Constitution Act; nor is it a Federal law inasmuch as it was not passed by the Legislative Assembly while functioning as a Chamber of the Indian Legislature during the transition period and, therefore, cannot be treated as having been passed by the Indian Legislature while functioning as the Federal Legislature within the meaning of S. 316, Constitution Act.

The second ground urged against the validity of the Act was that it was not passed in accordance with the requirements of S. 63 of the Act of 1919, which is continued in force in Sch. 9 to the Constitution Act. This section lays down, as already stated, that a Bill shall not be deemed to have been passed by the Indian Legislature unless it has been agreed to by both Chambers, either without amendment or with such amendments only as may be agreed to by both Chambers. It was argued that though the Council of State purported to agree to the Hindu Women's Rights to Property Bill as passed by the Assembly without amendment, it must be deemed to have amended the Bill so as to confine the operation of the word "property" used in the Bill to "property, other than agricultural land," inasmuch as by the date on which the Council passed the Bill, it had been deprived of power to legislate with respect to agricultural land. As the Bill was not returned to the Assembly with the request that the Assembly should agree so to confine the operation of the word "property," it was not, so ran the argument, agreed to by both Chambers as required by S. 63, and thus could not become law by receiving the assent of the Governor-General. In my view this contention is untenable. On the face of it the Council of State agreed to the Bill as passed by the Assembly without amendment. The requirements of S. 63 were thus fulfilled. The Bill could not be returned to the Assembly to procure its agreement to any amendment as no amendment had in fact been made to the language of the Bill. Had the Council by an amendment expressly limited the operation of "property" to "property other than agricultural land," that, no doubt, would have necessitated reference back to the Assembly. The Council, whatever its intention, with regard to which it would be unprofitable, even if it were permissible, to speculate, did not choose to make any actual amend-

ment. There was, therefore, no occasion for the Bill to be returned to the Assembly.

A further contention was advanced on behalf of the respondents on the construction of the Act. It was argued that assuming that the Act was validly enacted, it went beyond the powers of the Indian Legislature inasmuch as it purported to regulate succession to property including agricultural land and thus invaded the provincial legislative field (Entry 21 of List 2). We were, therefore, asked to declare the whole Act invalid. In reply it was argued that the invalid part of the Act, namely, that relating to succession to agricultural land was severable from the valid part which could continue to operate effectively by itself. Alternatively it was argued that the word "property" in the Act should be construed as comprising only those categories of property with respect to which the Legislature which enacted the Act was competent to legislate; that is to say, property other than agricultural land. This last was the view that found favour with the Court when dealing with the matter on reference by the Governor-General. It was there explained that when a Legislature with limited and restricted powers makes use of a word of wide and general import like "property", the presumption must be that it uses it with reference to that kind of property with respect to which it is competent to legislate and to no other. Gwyer C. J. observed:

"There is a general presumption that a Legislature does not intend to exceed its jurisdiction (*see* cases cited in Maxwell on the Interpretation of Statutes (8th Edn.) p. 126) and there is ample authority for the proposition that general words in a statute are to be construed with reference to the powers of the Legislature which enacts it: (1941) F. C. R. 1211 at p. 27."

(1890) 25 Q. B. D. 129¹² at p. 134; (1883) 8 A. C. 82⁷ at p. 98; (1897) 1 Q. B. 396¹³ at p. 399; (1904) 1 Com. L. R. 91¹⁴ and the well known case in (1891) A. C. 455⁴ were relied upon. With the general rule so stated I am in respectful agreement. I also agree that the question of severability does not strictly arise in this case. The Court cannot in this case be asked to divide the Act into two parts—the part which the Legislature was competent and the part which it was incompetent to enact, inasmuch as "property" is a single word and is not divisible. What the Court is invited to declare is that on the true construction of the word "property" as used in the Act no part of the Act was beyond the powers of the Legislature that enacted it. The difficulty in the way of the acceptance of this invitation is that the

12. (1890) 25 Q. B. D. 129, *Colquhoun v. Heddon*.

13. (1897) 1 Q. B. 396, *Collman v. Mills*.

14. (1904) 1 Com. L. R. 91, *Emden v. Pedder*.

Legislature that enacted the Act was the Assembly functioning under S. 65 of the Act of 1919 and the Council functioning under S. 100 (2), Constitution Act, read with Entry 7 of List 3 of Sch. 7 thereto. The Assembly that passed the Bill had power to legislate with respect to property of all kinds and must be presumed to have intended to and did in fact legislate with respect to all descriptions of property. The Council that agreed to the Bill as passed by the Assembly had no power to legislate with respect to agricultural land. The Legislature that enacted the law was thus neither the Indian Legislature functioning under S. 65 of the Act of 1919 and having power to legislate with respect to every kind of property, nor the Indian Legislature functioning as the "Federal Legislature" during the transition period under S. 316, Constitution Act, having no power to legislate with respect to agricultural land. It was a hybrid made up of one Chamber of the Indian Legislature functioning under S. 65 of the Act of 1919 and another Chamber of the Indian Legislature functioning as the Federal Legislature during the transition period under S. 316, Constitution Act. How are the legislative powers of such a Legislature to be determined? Did it have power to legislate with respect to all descriptions of property under S. 65 of the Act of 1919 or had it power only to legislate with respect to property other than agricultural land under Ss. 100 (2) and 316, Constitution Act, read with Entry 7 of List 3? I venture to think that the proper answer to these queries is that which I have already given, viz., that one Chamber of the Indian Legislature functioning under the Act of 1919 could not co-operate with the other Chamber of the Indian Legislature functioning under S. 316, Constitution Act, to make valid laws. There is, therefore, no room in this case for the application of the rule laid down by the Judicial Committee in 1891 A. C. 455.⁴

It was faintly suggested that Act 11 of 1938 being a validly enacted law, its effect was to confirm Act 18 of 1937 and to cure whatever defects the latter Act might have suffered from. The Act of 1938 is only an amending enactment. If the Act of 1937 was not validly enacted, it could not be validated by implication by the mere enactment of an amending Act. It is true that any provision in the Act of 1938 which standing by itself might amount to a complete and effective piece of legislation, would be operative *proprio vigore* subject to the application of the rule in 1891 A. C. 455⁴ so far as the construction of the word "property" is concerned; but, I am not aware of any doctrine of law or rule of construction by the application of which the Act of 1938 could

be held by implication to validate the enactment of the Act of 1937.

On all other matters I am in agreement with the judgment just delivered by my brother Varadachariar. My regret at my inability to concur in the views expressed by my Lord and my learned brother on the question of the validity of Act 18 of 1937 is all the keener as I am in complete sympathy with the object which that Act was designed to achieve. I share my Lord's regret that the Legislature has not so far chosen to put the matter beyond the possibility of doubt by appropriate validating legislation and I venture to express the hope that that course might yet be adopted not only with reference to Act 18 of 1937, but also with regard to any other measure or measures the validity of which might be open to doubt on similar grounds.

By the Court — (14th December 1944).
— Adjourn delivery of the final directions of the Court to 18th December 1944.

By the Court — (18th December 1944).
— This appeal having been set down today for final directions, the Court makes the following

Order.—On the case put forward on behalf of the plaintiff before the Courts in Madras the estate left by Arunachala cannot, in our judgment, be regarded as his 'separate property' within the meaning of S. 3 (1), Hindu Women's Rights to Property Act (Act 18 of 1937). On our interpretation of that provision, the plaintiff will be entitled to a half-share (subject to the limitations mentioned in the decree of the High Court as to immovable property) only in so much of his properties as may be found to have been his 'separate property' in the narrow sense, that is property in respect of which the son would not have been entitled to claim coparcenary rights but only a right of inheritance on the father's death if he had survived the father. Whether there are such properties and what they are will have to be determined before the final decree is passed. This limited claim could not have been made or dealt with on the view taken by the plaintiff's advisers and the Courts in Madras as to the scope of S. 3 (1) of Act 18 of 1937 but that cannot deprive the plaintiff of what she may be found entitled to in the view that we have taken as to the scope of that section. No question of putting the plaintiff on terms arises because we are still at the stage of the preliminary decree and as to costs, we are directing the costs of all parties to come out of the estate.

Another question also arises out of our decision. So far as Arunachala's estate may

be held not to have been his separate property, it may be necessary to decide whether the plaintiff has any and what claim to maintenance. We express no opinion as to her right but as this action has been treated as an administration action, it may give rise to difficulties in the future if the matter is not dealt with now. As this question is bound up with the question as to the nature of the property, it will be convenient to have both the questions tried and determined before the final decree.

The result is that subject to the provisions hereinbelow made, the appeal is dismissed and the cross-objections are allowed. The case is remitted to the High Court at Madras with a declaration that (i) in place of cl. (a) in the decree of the High Court a provision to the following effect shall be substituted, namely that out of the estate of the deceased RM. AR. AR. RM. Arunachalam Chettiar comprising the properties described in the plaint Schs. A to D thereto annexed and further amplified by the Receiver's report No. 351 and other further reports of the Receivers appointed in the suit, the plaintiff is entitled to a partition of, and a half-share in such of the aforesaid properties as may be found to have been separate property of Arunachala in the sense explained in the judgment but excluding agricultural land situate in British India and immovable properties situate outside British India, (ii) that corresponding and consequential variations be made in cls. (b) and (d) of the decree of the High Court to show that the shares of defendants 1 and 2 are reduced to a quarter each only in respect of those properties in which the plaintiff is found entitled to a share and that in respect of other properties defendants 1 and 2 are entitled to a half-share each, and (iii) that the High Court will direct the trial and determination by the Court of first instance of (a) any claim for maintenance that may be put forward by the plaintiff and (b) any case that may be put forward by the plaintiff as to any of the items of property referred to in cl. (i) supra being 'separate property' of the deceased, so as to entitle the plaintiff to a share therein. In the circumstances of the case, we direct that the costs of all parties in this Court shall be paid out of the estate. Leave to appeal to His Majesty in Council granted.

R.K.

Appeal dismissed.

* A. I. R. (32) 1945 Federal Court 47

*(From Lahore : ('44) 31 A. I. R.**1944 Lah. 240.)*

4th May 1945

SPENS C. J., VARADACHARIAR
AND ZAFRULLA KHAN JJ.*Secretary of State — Appellant*

v.

I. M. Lall — Respondent.

Civil Appeal No. 12 of 1944.

(a) Government of India Act (1935), S. 205 —
Certificate under—Form of (Per Spens C. J., and
Zafrulla Khan J.).

No particular form of certificate is required under S. 205. A note added by the High Court to their judgment to the effect that as several substantial questions of law as to the interpretation of the Government of India Act were involved in the case and accordingly certifying that the case was a fit one for appeal to the Federal Court is a valid certificate under S. 205. [P 49 C 1, 2]

(b) Government of India Act (1935), Ss. 240(2),
244 and 321 — Secretary of State can dismiss
member of Indian Civil Service.

Section 244(1) empowers the Secretary of State to make appointments to the Indian Civil Service and by virtue of S. 321 appointments made before the commencement of part 3 of the Act of 1935 under the Government of India Act, 1919 would be deemed to have been made under the Act of 1935 and therefore would be subject to the same incidents. Section 240(2) clearly implies that the authority who has been given the statutory power of appointment has the power to dismiss. This result can also be obtained from the implication which would arise from the general common law rule, that a power to appoint carries with it, in the absence of any other provision, a power to dismiss. The Secretary of State therefore has power to dismiss not only those members of Indian Civil Service who were appointed by him but also those who were appointed prior to the commencement of part 3 of the 1935 Act under Act of 1919. [P 54 C 1]

(c) Master and servant — Secretary of State
can exercise power of dismissal on behalf of
Crown (Per Spens C. J., and Zafrulla Khan J.).

The executive powers of the Crown can (unless by statute or law otherwise provided) be exercised by or through the Minister responsible to Parliament for the exercise of those powers. There is no distinction with regard to the exercise of the executive functions of the Crown under the English law and in British India. The Secretary of State for India must be regarded as a Minister with the constitutional right to act on behalf of His Majesty in exercise of the right of the Crown to dismiss its servants. [P 54 C 2]

(d) Government of India Act (1919), S. 96B —
Civil Services (Classification and Control) Rules,
R. 55 — Non-compliance with — Effect of (Per
Spens C. J., and Zafrulla Khan J.).

Failure to comply with R. 55 when dismissing a servant does not give the dismissed servant any legal cause of action in a Court of law : ('37) 24 A.I.R. 1937 P. C. 31, *Rel. on.* [P 54 C 2]

(e) Master and servant — Power of Crown to
dismiss its servants at will—Limitations on, im-
posed by agreement — Dismissal in breach of
agreement if gives cause of action (Per Spens
C. J., and Zafrulla Khan J.).

Any limitation or qualification on the power of the Crown to dismiss its servants at will, attempted to be imposed by contract or agreement between some authority purporting to contract on behalf of the Crown and that servant is not legally enforceable and will give to the servant no cause of action if in fact he be dismissed in breach of any such agreement. [P 56 C 1]

(f) Government of India Act (1935), S. 240 (3), —Proviso (b)—Proviso (b) excludes Court's jurisdiction in determination of reasonable practicability of giving opportunity to show cause (Per *Spens C. J.*, and *Zafrulla Khan J.*).

Section 240 (3), proviso (b) excludes the jurisdiction of the Court in the determination of the reasonable practicability of giving an opportunity to show cause. There the decision is clearly a matter for the authority empowered to dismiss. [P 57 C 1]

• (g) Government of India Act (1935), S. 240 (3) —Meaning of (Per *Spens C. J.*, and *Zafrulla Khan J.*; *Varadachariar J.*, dissenting).

Per *Spens C. J.*, and *Zafrulla Khan J.* — The words "against the action proposed to be taken in regard to him" in S. 240 (3) require that there should be a definite proposal by some authority either to dismiss a civil servant or to reduce him in rank or alternatively to dismiss or reduce him in rank as and when final action may be determined upon. Section 240 (3) requires that as and when an authority is definitely proposing to dismiss or to reduce in rank a member of the civil service he shall be so told and he shall be given an opportunity of putting his case against the proposed action and as that opportunity has to be a reasonable opportunity, the section requires not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must then be given reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken. In some cases it may be sufficient to indicate the charges, the evidence on which those charges are put forward and to make it clear that unless the person can on that information show good cause against being dismissed or reduced if all or any of the charges are proved, dismissal or reduction in rank will follow. Each case will have to turn on its own facts. In all cases where there is an inquiry and as a result thereof some authority definitely proposes dismissal or reduction in rank, the person concerned must be told in full, or adequately summarised form, the results of that inquiry, and the findings of the inquiring officer and be given an opportunity of showing cause with that information why he should not suffer the proposed dismissal or reduction of rank. [A notice contained in the charge-sheet that possibly dismissal might be decided upon was held not to be adequate compliance with S. 240 (3)]: *Case law discussed*. [P 58 C 1, 2; P 59 C 1]

Per *Varadachariar J.* — Rule 55, Civil Service (Classification and Control) Rules, framed under S. 96B, Government of India Act, 1919, cannot be said to be inconsistent with S. 240 (3) of Act of 1935 and is therefore still in force by reason of S. 276 of Act of 1935. The requirements of S. 240 (3) demand nothing beyond what is required for compliance with the provisions of R. 55. What is required under R. 55 is that the charges should be communicated to the person charged, with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. The officer charged can put in a written statement of his defence, ask for an oral inquiry if he so desires and also ask to be heard in person. The inquiring officer is expected

to make a record of the evidence and to state his findings and the grounds thereof. Rule 55 does not contemplate the officer charged being given a copy of the finding of the inquiry officer and permitted to canvass its correctness. The steps provided for in R. 55 will be equally necessary under S. 240 (3); for the officer concerned cannot be held to have had a reasonable opportunity unless he had been informed of the charges against him and had been allowed to put forward his defence and to take part in the inquiry. But there is nothing in the language of S. 240 (3) to indicate that anything more or anything different was contemplated or to suggest that a further opportunity was to be given after the inquiry had been completed in the presence of the officer charged and the inquiring officer had made his report. [P 61 C 1, 2; P 62 C 1]

(h) Government of India Act (1935), S. 240 (3) —Breach of, gives rise to cause of action in Court of law—Court can determine whether opportunity to show cause was reasonable or not —Proper remedy for breach of S. 240 (3) indicated (Per *Spens C. J.*, and *Zafrulla Khan J.*).

Breach of statutory obligations imposed by S. 240 (3) will give to the person adversely affected a cause of action in a Court of law and the Court can determine whether or not the opportunity to show cause has or has not been reasonable. The proper remedy of the dismissed member of the Indian Civil Service is damages for wrongful dismissal for breach of the statutory obligations imposed by S. 240 (3). He will not be entitled to a declaration that he has never been dismissed or that he is still a member of the civil service: ('42) 29 A.I.R. 1942 F. C. 3, *Ref.*

[P 59 C 1]

(i) Civil P. C. (1908), O. 6, R. 17 — Claim for breach of S. 240 (3), Government of India Act, in High Court—Neither High Court nor plaintiff considering damages to be proper remedy —Leave to claim damages by amending plaint held should be given even at appellate stage in Federal Court (Per *Spens C. J.*, and *Zafrulla Khan J.*).

A dismissed member of the Indian Civil Service brought a suit for a declaration that he had never been dismissed or that he still remained a member of the Service as S. 240 (3), Government of India Act, had not been complied with. Neither the High Court which tried the suit nor the plaintiff in view of the Federal Court's decision in 1941 F. C. R. 37 considered that the proper remedy of the plaintiff was damages for wrongful dismissal in breach of statutory obligations imposed by S. 240 (3), Government of India Act. In the appeal before the Federal Court:

Held that in the exceptional circumstances leave should be given to the plaintiff to amend the plaint and claim damages for wrongful dismissal even at the appellate stage. [P 59 C 2]

C. P. C. —

('44) Chitaley, O. 6 R. 17, N. 13 Pt. 5; N. 9 Pt. 2.

('41) Mulla, Page 600 Pt.(s); Page 601, Note "Any . . . proceedings."

(j) Government of India Act (1935), S. 240 (1)—Opening words "except as expressly provided by this Act" in S. 240 (1) — Scope and effect of (Per *Spens C. J.*, and *Zafrulla Khan J.*).

The opening words "except as expressly provided by this Act" in S. 240 (1) include a limitation or qualification on what follows in S. 240 (1) by provisions found later on in the same section and also by provisions found elsewhere in the Act outside S. 240 itself. [P 57 C 1]

(k) Government of India Act (1935), S. 247 and Rr. 50 and 52, Civil Service (Classification and

Control) Rules, framed under S. 96B, Government of India Act, 1919 — Member of all India Service serving in province — Provincial Government can initiate inquiry into conduct of member (Per *Varadachariar J.*).

Even members of an all India Service are, when they serve in a province, subject to the authority and the rule-making power of the Governor, except in so far as rules made by the Secretary of State provide otherwise. The Provincial Government has authority to initiate inquiry into the conduct of a member of an all India Service serving in the province. [P 62 C 2]

(l) Government of India Act (1935), S. 240 — Inquiry into conduct of member of Civil Service is primarily for decision of executive (Per *Varadachariar J.*).

The matter of inquiry into the conduct of a member of the Indian Civil Service is one primarily for the decision of the executive authority. [P 62 C 2]

(m) Government of India Act (1935), S. 240 — Inquiry into conduct of member of Civil Service — Power of Court to examine conclusions reached by inquiring officer or responsible authorities — Limitations on (Per *Varadachariar J.*).

Where an inquiry is held into the conduct of a member of the Indian Civil Service the Court has no right to examine the correctness of the inferences drawn or conclusions reached by the inquiring officer or by the responsible authorities. Any opinion that the Court may form on these points or on the appropriateness of the punishment meted out to the officer cannot be allowed to influence the consideration of the only point open to examination by the Court, namely, the adequacy of the opportunity afforded to the officer charged. [P 63 C 1]

N. P. Engineer (with S. M. Sikri), instructed by K. Y. Bhandarkar, Agent — for Appellant. Respondent in person, instructed by Naunit Lal, Agent.

JUDGMENT

Spens C. J. and Zafrulla Khan J.

Spens C. J. — This is an appeal by the Secretary of State for India in a suit instituted by the respondent, Mr. I. M. Lall who was a senior member of the Indian Civil Service in the year 1940, when the Secretary of State for India purported to remove him from the service. Mr. Lall's suit was originally commenced in the Court of the Sub-Judge, First Class, Lahore. It was later transferred to the High Court for hearing and was finally heard by a Division Bench of the High Court (Abdul Rashid and Ram Lal JJ.). On 27th March 1944, the High Court made a decree in Mr. Lall's favour declaring that the order made in the year 1940 for the removal of Mr. Lall from the Indian Civil Service with effect from 4th June 1940, was wrongful, void, illegal and inoperative, and that Mr. Lall was still a member of the Indian Civil Service. At the time the learned Judges made this order they added a note to their judgment that several substantial questions of law as to the interpretation of the Government of India Act, 1935, were involved in the case, and they accordingly certified that it was a fit case for

appeal to the Federal Court. Hence this appeal. It was suggested by Mr. Lall that the above certificate was not in proper form to comply with S. 205, Constitution Act, 1935. We were wholly unable to accept any such contention. The intention of the learned Judges is quite plain. No particular form of certificate is required.

The material facts can be summarised as follows: Mr. Lall was appointed to the Indian Civil Service in the year 1922, and on 1st September in that year entered into a covenant with the Secretary of State in Council. The covenant recited that the Secretary of State in Council had appointed Mr. Lall

"to serve His Majesty as a member of the Civil Service of India. . . . such service to continue during the pleasure of His Majesty, His Heirs and Successors, to be signified under the hand of the Secretary of State for India. . . ."

In the year 1935, Mr. Lall was stationed in Hoshiarpur. While there, he enlisted one Sundar Das, a nephew of his wife, in the subordinate staff of one of the Courts under his control. Shortly thereafter Mr. Lall took over charge as District and Sessions Judge at Multan. In June 1935, two applications were received from Sundar Das for the transfer of Sundar Das to Multan. In August 1935, Mr. Lall appointed Sundar Das as Ahlmad to one of the Sub-Judges under him, in an officiating arrangement. In April 1936, Mr. Lall went on leave to England and whilst he was on leave Sundar Das was reverted to unemployment. On 22nd October 1936, Mr. Lall resumed charge as District and Sessions Judge, Multan, and on 29th October 1936, Mr. Lall signed a proposal for Sundar Das to be appointed Ahlmad at the Sub-Judge's Court, Leiah. On 23rd December 1936, Mr. Lall approved a further proposal put up by the Clerk of his Court for the confirmation of Sundar Das in place of an official who had retired. This order would have had the effect of promoting Sundar Das over the heads of a number of subordinate officials senior to him. Several of the persons affected took steps to petition against this order. Subsequently, on or before 20th March 1937, the Clerk of Court put up to Mr. Lall a note explaining that a mistake had been made and that the vacancy in which Sundar Das had been appointed actually did not exist and suggested the cancellation of the order of 23rd December 1936. On 22nd March 1937, Mr. Lall cancelled his order of 23rd December 1936, but simultaneously confirmed a series of proposals including the confirmation of Sundar Das as a paid candidate. Early in April 1937, Mr. Lall was transferred to be employed in the North-West Frontier Province. Before going however he passed a

number of orders affecting some of the junior officials who had protested against the order of 23rd December 1936. By an order of 4th March 1937, he directed the posting of one of them to Alipore, alleged to be a particularly unpleasant station. By one of the orders made on 22nd March 1937, he confirmed a proposal by the Clerk of Court to transfer two other of such persons, from headquarters at Multan to Muzaffargarh and Khanewal as a disciplinary measure. By another order he reduced one of these one place in seniority and before he left Multan he recorded adverse remarks in the service books of four of the persons who had protested.

In September 1937, whilst Mr. Lall was serving in the North-West Frontier Province, he received a letter from the Judicial Commissioner, enclosing a letter, dated 2nd September 1937, from the Chief Secretary to N.-W.F.P. Government, informing the Judicial Commissioner, that the Punjab Government had decided to hold a departmental enquiry under R. 55 of the Civil Services (Classification, Control and Appeal) Rules into the conduct of Mr. Lall whilst stationed at Multan during 1935-36, and that eight charges had been framed against Mr. Lall of which copies were enclosed. The letter proceeded to ask that steps should be taken to serve the charges on Mr. Lall and that Mr. Lall should be asked to furnish within a reasonable time a written statement of his defence and to state whether he wished to be heard in person or not. The eight charges enclosed were divided into two categories. The first category alleged improper favouritism or nepotism in connection with Mr. Lall's dealings with Sundar Das, the second alleged improper victimization of certain of the junior officials who had protested against the attempted promotion of Sundar Das by the order of December 1936. At the end of each charge was indicated the witnesses or documents whereby it was proposed to attempt to prove the charge. Interposed between the last charge (that dealing with the adverse entries in the service books) and the indication of the evidence by which that charge was proposed to be proved, there were two paragraphs to the following effect :

"That the above facts and his failure to offer any sufficient explanation up to the present are sufficient to prove that he had abused his position as an officer entrusted with the power of appointment on behalf of the Crown to show favour to a relation of his to the detriment of other officials serving under him, in contravention both of the recognised principles governing the conduct of Government servants as well as of the express orders of Government, and that he further abused his position as an officer entrusted with powers of discipline over other officers of the Crown to persecute various persons who

sought to protect their own interests in a legitimate manner.

That he should show cause why he should not be dismissed, removed or reduced or subjected to such other disciplinary action as the competent authority may think fit to enforce for breach of Government rules and conduct unbecoming to a member of the Indian Civil Service."

After obtaining copies of the documents referred to Mr. Lall in due course, namely, on 9th January 1938, put in his written statement in answer to the charges. At the same time he asked for certain other documents and stated :

"I wish to be heard in person. My position in this matter is that there is no necessity of an oral enquiry. All my orders are in writing. The materials sought to be used against me are also in writing. On these materials the Government can give their decision."

Shortly thereafter, Mr. J. D. Anderson, Commissioner, Rawalpindi Division, was appointed to hold the departmental enquiry and on 10th June 1938, Mr. Anderson examined Mr. Lall on the eight charges, which examination Mr. Anderson reduced into writing on 11th June 1938. In that statement Mr. Lall dealt with each charge at considerable length. Having recorded Mr. Lall's statement, Mr. Anderson considered it necessary to record a statement by Lala Chaman Lal, the Clerk of Court in Mr. Lall's Sessions Court at Multan. Lala Chaman Lal was duly examined in the presence of Mr. Lall who was permitted to ask whatever questions he desired and his statement was recorded on 30th July 1938. Mr. Anderson did not examine any other witnesses, nor did Mr. Lall apply for leave to examine any other witnesses. On 9th August 1938, Mr. Anderson made his report. Mr. Anderson pointed out that Mr. Lall pleaded guilty to the first two charges dealing with the enlistment and transfer to Multan of Sundar Das and to the signing of the order of 23rd December 1936. The remaining charges, Mr. Anderson found, on the evidence before him, were unproven. He went on however to indicate that he had not been able to make a full enquiry and that a longer investigation including a fortnight at Multan was desirable before coming to final conclusions. He indicated the desirability of numbers of other documents being examined in order to compare what Mr. Lall had done in other cases with what he had done in the cases which were the subject-matter of the charges. He finally suggested three courses to Government: (1) that orders should be passed on those charges only to which Mr. Lall had pleaded guilty, leaving the question of his guilt on the other charges undecided; (2) to hold that as the Clerk of Court was clearly not speaking the whole truth Mr. Lall's word should be

accepted and the last six charges should be taken as breaking down for lack of proof; and (3) that anything Mr. Anderson had done should be regarded as a preliminary enquiry only and that some other officer should be appointed to make a complete investigation. Mr. Anderson proceeded to express his view that the third was the proper course. He moreover indicated, in the concluding paragraphs of his report, the further documents and matters which he would wish to look into before coming to final conclusions.

The Government did not disclose Mr. Anderson's report to Mr. Lall but proceeded to adopt Mr. Anderson's third suggestion and appointed Mr. F. L. Brayne (Commissioner, Rural Reconstruction, Punjab) to complete Mr. Anderson's preliminary enquiry. On 14th November 1938, Mr. Lall was informed by a letter from the Chief Secretary to Government, Punjab, that Mr. Anderson had been unable to complete the enquiry against him and that its completion had been entrusted to Mr. Brayne. On 17th November 1938, Mr. Brayne wrote to Mr. Lall giving him the same information and informing him that the enquiry would have to be completed or at least part of it in Multan, and asking Mr. Lall to let him know the earliest date on which he could meet Mr. Brayne there. Mr. Brayne concluded by saying that he did not expect that it would take more than at most one or two days. Mr. Lall immediately took up the position that he did not understand what was happening, that he understood Mr. Anderson had completed the enquiry, and asked the Chief Secretary that he might be supplied with a copy of the report of Mr. Anderson or at least the portion of it in which it was said that his enquiry was incomplete and that he might be given a copy of the order of the Punjab Government on the report. The Government refused to give Mr. Lall any further information on the position. Mr. Lall had meantime returned from duty in the North-West Frontier Province and had been posted as Additional District and Sessions Judge, Lyallpur, and had to undertake a tour arranged before his return. He accordingly asked by a letter addressed to Mr. Brayne on 24th November 1938, that he might not be called to attend the enquiry until after Christmas. Mr. Brayne replied that his engagements prevented him dealing with the enquiry during the first half of January and suggested that Mr. Lall should meet him at Multan on the morning of Saturday, 10th December, and expressed the view that he could finish everything before the mail train left on Sunday afternoon for Lahore. He subsequently by letter and telegram asked Mr. Lall to meet

him on the 9th instead of on the 10th as he desired to catch the mail train to Lahore on Saturday, the 10th.

Meantime by a letter of 29th November 1938, Mr. Brayne informed him that at Multan he proposed to examine various other documents and purported to indicate the classes of documents which he proposed to examine at Multan and the reasons why he was proposing to examine them. To any one who had read Mr. Anderson's report this letter of Mr. Brayne would clearly have indicated what Mr. Brayne was proposing to do and why Mr. Lall had however been refused a sight of Mr. Anderson's report. Whilst before us, it was submitted on behalf of the appellant that this letter adequately apprised Mr. Lall of what was in Mr. Brayne's mind, Mr. Lall at the time took up the position, and has since maintained, that it only added to his confused state of mind. On 9th December 1938, Mr. Lall met Mr. Brayne at Multan. Certain of those further documents which had been collected were shown to Mr. Lall, but Mr. Lall insisted that he did not understand his position and that he considered that Mr. Anderson's enquiry had been completed, and he asked for adequate time to understand his position. In these circumstances the interview was a short one and it was arranged that Mr. Lall should put his representations in writing as regards the procedure by 19th December and that there should be a further meeting on 20th December at Lahore and meantime copies of the relevant parts of the new documents should be sent to him. Accordingly, on 11th December 1938, Mr. Brayne sent to Mr. Lall a large number of copies of the relevant parts of the new papers and in addition a list of 42 character rolls in which entries had been made by Mr. Lall in 1936 or 1937. Mr. Lall was informed that if he wished to see the originals on the 20th, he could do so if he gave sufficient notice.

On 15th December, Mr. Lall acknowledged receipt of the documents and asked for certain other documents to be produced at the meeting of the 20th. On 18th December, Mr. Lall duly enclosed to Mr. Brayne his submissions in writing in regard to Mr. Brayne's enquiry. In his submission Mr. Lall again made it abundantly clear that he did not understand what was happening; that he did not understand what the further documents were for or how or in respect of what charges they were relevant, and that none of them were mentioned in the charge sheet. In these circumstances Mr. Lall again met Mr. Brayne at Lahore on the 20th. This interview admittedly lasted a considerable time, and according to Mr. Brayne's note made at the time and

subsequently explicitly confirmed in his evidence given later at the hearing of the case in the High Court, Mr. Brayne explained the relevancy of the new documents to Mr. Lall and the reasons for which he was looking at them. Mr. Lall persisted that unless he was given a copy of Mr. Anderson's report and the Government orders thereon, he was not being given adequate opportunity of defending himself as provided by R. 55. He asked for certain other documents and according to Mr. Brayne he then addressed him about the case. He was further permitted to put in a further memorandum on the case by 26th December. On 26th December Mr. Lall forwarded to Mr. Brayne this further memorandum. Neither the original nor a copy of this document has been produced in the course of the proceedings. On 30th December the parties again met but this written document, having been sent to Mr. Brayne in camp, had not reached him. Mr. Lall expressed the desire to address Mr. Brayne again personally after he had read Mr. Lall's written representations and 2nd January was fixed for this purpose. Accordingly on 2nd January 1939, Mr. Brayne saw Mr. Lall again, and according to Mr. Brayne, Mr. Lall completed all that he desired to say to him on the case. On 24th January 1939, Mr. Brayne made his report.

In his report Mr. Brayne was not content with merely accepting Mr. Lall's plea of guilty to the charges of nepotism, but went into the details and surrounding circumstances at great length and found that the nepotism was "complete and deliberate." As regards the charges of vindictiveness, Mr. Brayne again went into all the details and the surrounding circumstances and found that these charges were all fully proved. This report was sent on 21st June 1939, to the Federal Public Service Commission, together with some finding and recommendations of the Punjab Government thereon, for their consideration, and by a letter, dated 31st August 1939, from the Secretary of the Federal Public Service Commission to the Secretary to the Government of India, Home Department, the Commission expressed their concurrence in the views of the Punjab Government that Mr. Lall was unfit to be retained in the Indian Civil Service and recommended that he be removed from service under Art. 353 of the Civil Service Regulations, but that in view of his seventeen years' service he should be granted the full compassionate allowance permissible under that article.

From this it is clear that by 31st August 1939, there were definite proposals or recommendations of the Punjab Government, concurred in by the Federal Public Service Com-

mission, that Mr. Lall should be removed from the service on the grounds and for the reasons set out in Mr. Brayne's report. In the Gazette of 10th August 1940, there appeared a notification, over the signature of the Chief Secretary, Punjab Government, to the effect that

"His Majesty's Secretary of State for India has directed the removal of Mr. I. M. Lall from the Indian Civil Service with effect from 4th June 1940."

By letter dated 10th August 1940, Mr. Lall was informed by the Punjab Government of his removal and was given a copy of the letter of 31st August 1939, above referred to, from the Federal Public Service Commission. Meantime after the date of Mr. Brayne's report Mr. Lall remained energetic in his attempts to secure copies of the reports of Mr. Anderson and Mr. Brayne and therewith to make personal representations to the authorities. In June 1939, in particular, he pressed for an interview with His Excellency the Governor of the Punjab and on 16th June repeated his request for copies of the report. This interview was not granted on the ground mainly that his case had passed to higher authority. Whereupon on 23rd June 1939, Mr. Lall requested that if the authority to decide his case were the Secretary of State, he might be permitted to place his side of the case before the Secretary of State in person and that he might be granted facilities for that purpose. On 26th June 1939, he was told that if he had representations to make they could be addressed to the Governor-General in the form of a memorial under the rules relating to the submission of memorials. In the spring of 1940, Mr. Lall proceeded to London where he appears to have tried to make representations in person at the India Office. Whatever representations were made it is clear that at no time before his removal from the service was Mr. Lall allowed to see the reports of either Mr. Anderson or Mr. Brayne, nor was he informed that either the Punjab Government or the Federal Public Service Commission or the Government of India or the Secretary of State were definitely proposing on the basis of those reports to remove him from the service. He had received the general invitation to show cause against possible dismissal (amongst other possible punishments) included at the end of the charges originally served on him. But no opportunity to show cause against dismissal was given to him, after dismissal had passed from being a possible punishment to the punishment proposed and recommended. At no time was he given an opportunity, before dismissal, of making representations against the accuracy of facts found by Mr. Anderson or Mr. Brayne

in their reports or against the adverse deductions drawn against him, particularly by Mr. Brayne. After Mr. Lall had been notified of his removal, he proceeded to enquire as to the authority under which the Secretary of State had purported to order his removal. In a letter from the Department of the Chief Secretary to the Punjab Government, he was informed on 19th March 1941, that the Secretary of State had not disclosed the authority under which he was acting, but the attention of Mr. Lall was drawn to R. 50 of the Civil Services (Classification, Control and Appeal) Rules read in conjunction with sub-s. (2) of S. 240, Government of India Act. Mr. Lall was not satisfied with this reply and made enquiries of the Secretary of State himself. By letter dated 6th October 1941, Mr. Lall was informed through the Punjab Government that in removing him from the Indian Civil Service

"the Secretary of State acted on behalf of His Majesty in exercise of the rights of the Crown to dismiss its servants at pleasure."

On 20th July 1942, Mr. Lall filed his suit asking for a declaration that the order of removal of the plaintiff from the Indian Civil Service was not passed in due course of law and was wrongful, illegal and ultra vires of the defendant and that Mr. Lall was still a member of the Indian Civil Service and for other relief. Before the case had been transferred to the High Court, the Sub-Judge had settled a preliminary issue as follows:

"Whether the Secretary of State had authority to remove the plaintiff from the Indian Civil Service, even if the enquiries were illegal or ultra vires."

After the case had been transferred to the High Court, the learned Judges in addition to the preliminary issue, framed a number of further issues including the following:

(1) Did the Secretary of State have authority to remove the plaintiff from the Indian Civil Service?

(2) Was it incumbent on the defendant to hold an enquiry before making an order removing the plaintiff from service?

(3) If so what should be the nature of such enquiry?

(4) Was not the plaintiff given adequate opportunity of defending himself as contemplated in R. 55 of the Civil Services (Classification, Control and Appeal) Rules? If not, what is the effect?

(5) Was not the plaintiff given reasonable opportunity of showing cause as laid down in S. 240 (3) of the Government of India Act, 1935? If not, what is the effect?

(6) Is the Court entitled to determine the question whether the opportunity given was reasonable or not?

(8) Did not Mr. Brayne conduct the enquiry bona fide? If not, what is the effect?"

On the preliminary issue the learned Judges came to the conclusion that the plaintiff could not be removed from office until he had been given a reasonable opportunity of showing cause. This determination also governed their

decision on issue 2. On issue 1, the decision was that the Secretary of State had authority to remove the plaintiff from the Indian Civil Service. As regards issue 3, the learned Judges decided that the legal obligation would be adequately complied with provided that the person concerned knew all the charges against him, and an enquiry was held in such a manner that he had reasonable opportunity to defend himself and was not prejudiced or misled in the matter of his defence. Issues 4 and 5 were thereupon dealt with together on the basis that R. 55 and sub-s. (3) of S. 240 required a like compliance with the legal obligation as above set out and that what would be a breach of one would be a breach of the other, and after an exhaustive examination of exactly what happened in Mr. Lall's case, the learned Judges came to the conclusion that on the facts of the case the enquiry had not been conducted by Mr. Brayne in accordance with what appeared to them to be the legal requirements above set out. On issue 8, the learned Judges accordingly found that as Mr. Brayne had not conducted the enquiry, in their view, in accordance with such legal requirements, the conduct of the enquiry could not be regarded as bona fide. On issue 6, the learned Judges held that it was for the Court to determine whether the opportunity given was reasonable or not. In the result they decided in favour of Mr. Lall and made a declaration that the order of the removal of the plaintiff was wrongful, void, illegal and inoperative and that he still remained a member of the Indian Civil Service.

Before us, all the issues have been fully recanvassed by the Advocate-General of India and by Mr. Lall appearing in person. The first matter to be discussed is the question whether under the Constitution Act of 1935 the Secretary of State for India has authority to remove a member of the Indian Civil Service from the service. If of course as Mr. Lall has strenuously urged no member can under any circumstances be removed by an order of the Secretary of State, it would be unnecessary to discuss any of the other issues in the case. Mr. Lall endeavoured to put before us a detailed historical account indicating that from at least the year 1833 onwards there was always an express statutory provision prescribing the authority and manner in which an officer of the East India Company and subsequently an officer serving His Majesty in India could and should be dismissed. He submitted that throughout, whatever authority subordinate to His Majesty was given a statutory power of dismissal, there was always also an overriding power in His Majesty himself to dismiss. He argued that when on the

coming into operation of Part III, Constitution Act of 1935, the Secretary of State in Council together with all his powers came to an end, all powers formerly exercisable by him were by virtue of s. 2, Constitution Act, 1935, vested in His Majesty, and that as under the Constitution Act there was no express delegation of such power to the Secretary of State and no express directions by His Majesty under sub-s. (1) of s. 2 as to the manner in which those powers were to be exercised by anyone on behalf of His Majesty, it followed that it was only His Majesty himself who could dismiss a member of the Indian Civil Service under the present circumstances. Even if it be open to Mr. Lall, having regard to the terms of his covenant of 1st September 1922, to question a signification of His Majesty's pleasure by the Secretary of State, which may well be doubted, we are unable to accept Mr. Lall's arguments.

In our judgment the power of the Secretary of State to dismiss, after the coming into operation of the Constitution Act of 1935, members of the Indian Civil Service who were appointed by the Secretary of State in Council prior to the commencement of Part III of the Act, is implied in the Constitution Act itself. Section 244 (1) provides that as from the commencement of Part III of the Act, appointments to the Indian Civil Service shall be made by the Secretary of State. Section 321 (b) provides that the repeal of the 1919 Act shall not affect any appointment to any office made under it, and that any such appointment shall have effect as if it were an appointment to the corresponding office under the 1935 Act. Mr. Lall must accordingly as from 1st April 1937 be regarded as if he had been appointed to the Indian Civil Service by the Secretary of State. Sub-section (2) of s. 240 provides that no person who is a member of the Civil Service of the Crown in India shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed. There would here seem to be a clear implication that the authority who has been given the statutory power of appointment has the power to dismiss. This result can also be obtained from the implication which would arise from the general common law rule, that a power to appoint carries with it, in the absence of any other provision, a power to dismiss. On these grounds, in our opinion, there can be no reasonable doubt that from the Constitution Act itself can be found the requisite power in the Secretary of State in the year 1940 to dismiss Mr. Lall from the Indian Civil Service.

Moreover, if contrary to our views there be any difficulty in construing the Constitution

Act so as to find therein the requisite power for the Secretary of State to dismiss a member of the Indian Civil Service, there would still, in our judgment, be no difficulty in holding that an exercise of the power of dismissal from one of His Majesty's services by the principal Secretary of State concerned was the proper constitutional manner in which the power of the Crown should be exercised. It is surely hardly necessary in this 20th century to require authority for the practice that the executive powers of the Crown can (unless by statute or law otherwise provided) be exercised by or through the Minister responsible to Parliament for the exercise of those powers. Reference may however be made to Halsbury, Vol. 6, at para. 760:

"The exercise of the executive powers vested in the Sovereign is delegated in practice to the various political officers who compose the Ministry or Government, certain of whom are the heads of the principal government offices or departments of State and to government offices having no political heads, and whose staff is composed of permanent members of the Civil Service."

Mr. Lall does not contest this constitutional doctrine as regards executive actions so far as English law is concerned. But he seeks to establish a difference in regard to the exercise of the executive functions of the Crown in British India. We are unable to accept any such distinction and are of opinion that if there was nothing in the Constitution Act indicating a power in the Secretary of State to dismiss members of the Indian Civil Service, the Secretary of State would none the less be a Minister with the constitutional right to exercise the power of dismissal on behalf of the Crown. In our judgment when the Secretary of State in June 1940 authorised the removal of Mr. Lall he was properly purporting to act on behalf of His Majesty in exercise of the right of the Crown to dismiss its servants.

The next and the really important and difficult question in this case is whether there was any legal limitation or restriction enforceable by action on the power of the Crown through the Secretary of State so to dismiss Mr. Lall, and if so, whether such limitation or restriction was or was not complied with in fact before the order for Mr. Lall's removal in June 1940. The answer to this question involves the determination of the true construction of s. 240, Constitution Act, which is as follows:

"(1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him :

Provided that this sub-section shall not apply—

(a) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity for showing cause.

(4) Notwithstanding that a person holding a civil post under the Crown in India holds office during His Majesty's pleasure, any contract under which a person, not being a member of a civil service of the Crown in India, is appointed under this Act to hold such a post may, if the Governor-General, or, as the case may be, the Governor, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post."

First, however, the legal position before the coming into operation of the Constitution Act requires to be considered. Section 96B, Government of India Act, 1919, provided (inter alia) (a) that subject to the provisions of that Act and all rules made thereunder, every person in the Indian Civil Service held office during His Majesty's pleasure, (b) that no such person might be dismissed by any authority subordinate to that by which he was appointed, and (c) that the Secretary of State in Council might (except so far as he might provide by rules to the contrary) reinstate any such person who had been dismissed. Rules were made under this section. The relevant rules for this case are Rr. 50 and 55 of the Civil Services (Classification, Control and Appeal) Rules:

"Rule 50. No member of an all-India Service, and no person, holding the King's Commission on the active list of Regular Army, the Royal Air Force, the Royal Indian Navy or on the Supernumerary List of the Indian Army or appointed by the Secretary of State in Council shall be removed or dismissed except by order of the Secretary of State in Council."

"Rule 55. Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of dismissal, removal or reduction shall be passed on a member of a Service (other than an order based on facts which have led to his conviction in a criminal Court) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires or if the authority concerned so direct an oral inquiry shall

be held. At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called, as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof.

This rule shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the rule may, in exceptional cases, for special and sufficient reasons to be recorded in writing, be waived, where there is a difficulty in observing exactly the requirements of the rule and those requirements can be waived without injustice to the person charged."

These rules were in operation immediately prior to the coming into operation of Part 3, Government of India Act, 1935, and under S. 276 of that Act would continue in force notwithstanding the repeal of the 1919 Act, if and in so far as the provisions of the rules were consistent with the Constitution Act, in which case they were to be deemed to be rules made under the appropriate provisions of the 1935 Act. It has been suggested before us that these rules did not continue in force, because their provisions are in fact inconsistent with the relevant provisions of the Constitution Act, or alternatively, that they could not have continued in force as they contained provisions which the rule-making authorities under the Constitution Act of 1935 could not have prescribed. The first suggestion depends upon the true construction of S. 240, Constitution Act, and whether or not the requirements prescribed by R. 55 are or are not consistent with the provisions of sub-s. (3) of S. 240. The second question would appear to depend on whether or not a power to make rules in respect of conditions of service includes a power to make rules in respect of conditions in regard to dismissal or removal from the service. In the view however which we take of S. 240 it is wholly unnecessary to decide to what extent, if at all, Rr. 50 and 55 remain in force after 1st April 1937. In our view the question whether R. 55 was in force or whether or not it was in fact in this case complied with is not relevant, for even if it were in force and had not been complied with, it is in our judgment clear that failure to comply with such a rule could not give Mr. Lall any legal cause of action : see 64 I. A. 55.¹ The question as to the meaning and effect of S. 240 appears to us to require determination in the first instance quite irrespective of the possible continued existence of the previous rules. For it is only a breach of the

1. (1937) 24 A. I. R. 1937 P. C. 31 : I. L. R. (1937) Mad 532 : 64 I. A. 55 : 166 I. C. 516 (P. C.), Venkata Rao v. Secretary of State.

statutory provisions of S. 240 which can possibly afford Mr. Lall a good cause of action. The first and chief difficulty of construing S. 240 arises from the fact that in the same section it is expressly stated that except as provided by this Act every person who is a member of a Civil Service of the Crown in India "holds office during His Majesty's pleasure", and that provision is immediately followed by sub-ss. (2) and (3), apparently limiting or qualifying the right of dismissal at will of such servants by the Crown.

The general rule of law is that except as otherwise provided by statute, servants of the Crown hold their appointments at the pleasure of the Crown. Where in the case of any particular servants of the Crown, statutory limitations or qualifications on the right of dismissal are found in statutes in which the general rule is not expressly enacted but left to have operation, if at all, only by implication, it has been possible for Courts to hold that those limitations and qualifications are mandatory and effective and breach of them gives rise to a cause of action: *cf.*, 1896 A. C. 575.² On the other hand where such limitations or qualifications are found only in rules made under a statute, which whilst expressly enacting that servants of the Crown hold office during His Majesty's pleasure also provides that such tenure is subject to the provisions of rules made thereunder, none the less breach of the provisions of such rules may afford no cause of action at all: *cf.*, S. 96B, Government of India Act, 1919, and the Civil Services (Classification, Control and Appeal) Rules made thereunder and the decision in 64 I. A. 55.¹ If in this case we had merely been dealing with a breach of R. 55, the decision in 64 I. A. 55¹ would, as indicated earlier, have been decisive against any claim by Mr. Lall. Again it may also well be that any limitation or qualification on the power of the Crown to dismiss its servants at will, attempted to be imposed by contract or agreement between some authority purporting to contract on behalf of the Crown and that servant is not legally enforceable and will give to the servant no cause of action if in fact he be dismissed in breach of any such agreement: (1920) 37 T. L. R. 138.³ But the material provisions in this case are not left to be dealt with in rules, or in any agreement or contract. They are embodied in the very section itself.

Prior to the Constitution Act of 1935, it is true that Parliament had enacted in S. 96B, Government of India Act, 1919, a statutory provision combining in sub-cl. (1) thereof

(a) the provision that persons in the civil service of the Crown in India held office during His Majesty's pleasure subject to the provisions of the Act and of rules made thereunder with (b) the provision that no person in that service might be dismissed by any authority subordinate to that by which he was appointed. This last provision is reproduced in sub-s. (2) of S. 240 of the 1935 Act. But prior to the coming into force of the 1935 Act, no case had been based on these provisions in question in the 1919 Act. The only other previous enactment, to which our attention was drawn, in which there was combined an express statement that officers hold their appointment during pleasure with apparent limitations or qualifications on the right of dismissal at will was S. 16, Commonwealth of Australia Defence Act 1903-1918, which provided that

"Officers shall hold their appointments during the pleasure of the Governor-General but the commission of an officer shall not be cancelled without the holder thereof being notified in writing of any complaint or charge made and of any action proposed to be taken against him nor without his being called upon to show cause in relation thereto."

This was the material section in 29 Com. L. R. 219.⁴ There, on the claim of an officer for a declaration that his commission had not been validly cancelled and for arrears of pay or alternatively for damages for breach of the statutory duties imposed by S. 16, Knox C. J. having decided upon the facts that any such statutory duties had been duly performed and that the plaintiff's claim was in any event ill-founded in fact, went on to express the opinion that the provisions in S. 16 which were introduced by the word "but" were directory only and did not constitute conditions precedent to the exercise by the Governor-General of the right of cancellation of a commission. This decision was referred to in the judgment of Latham C. J. in (1938) 60 Com. L. R. 68⁵ as an example of the complete maintenance of the old rule in the case of the Commonwealth Military Forces. He appears to have accepted the dictum of Knox C. J. as right, but the remark of Latham C. J. himself was made in the course of a judgment in a case wholly distinguishable on the facts both from 29 Com. L. R. 219⁴ and this case.

It is not surprising therefore that the Advocate-General of India argued that the express provision of sub-s. (1) of S. 240 clearly overrode any limitation or qualification imposed by sub-s. (3) whilst as regards sub-s. (2) he submitted that it was not really a limitation on the power to dismiss but merely a statutory direction as to the channel by which

2. (1896) 1896 A. C. 575, *Gould v. Stuart*.

3. (1920) 37 T. L. R. 138, *Denning v. Secretary of State*.

4. 29 Com. L. R. 219, *Cross v. The Commonwealth*.

5. (1938) 60 Com. L. R. 68, *Fletcher v. Nott*.

the Royal pleasure was to be executed. On that ground he accepted as he was bound to, the decision of this Court in 1941 F. C. R. 37.⁶ But as regards sub-s. (3), the learned Advocate-General argued that its provisions were very different in effect from those of sub-s. (2) and that it should be construed as directory only in accordance with the obiter dictum of Knox C. J. in 29 Com. L. R. 219.⁴ He supported this argument by submitting that the opening words of sub-s. (1) "Except as expressly provided by this Act" clearly did not apply to anything in S. 240 itself but only to provisions, such as the tenure of office of Judges, to be found elsewhere in the Act outside S. 240, and that the words "during His Majesty's pleasure" should therefore be construed as wholly unqualified in law by anything in the Section itself. Alternatively, the learned Advocate-General argued that if any limitation or qualification enforceable by action were imposed by the provisions of sub-s. (3) such limitation had, on the facts of this case, been fully complied with and that Mr. Lall had had all reasonable opportunity of showing cause. The learned Advocate-General finally submitted that it was in any event not for the Court but for some executive authority to decide whether or not Mr. Lall had had reasonable opportunity. This last submission is the point raised by Issue No. 6 in the action and, on that point, we agree with the decision of the learned Judges of the High Court and for the reasons stated by them hold that it is not possible to construe sub-s. (3) so as to exclude the jurisdiction of the Court to determine whether or not the opportunity to show cause has or has not been reasonable. In particular, we would call attention to the contrast in the wording of sub-cl. (b) of the same sub-section where proper words appear to us to have been used to exclude the jurisdiction of the Court in the determination of the reasonable practicability of giving an opportunity to show cause. There the decision is clearly a matter for the authority empowered to dismiss. In the main portion of sub-s. (3) there is no similar indication that the decision is only a matter for some executive authority.

Turning to the earlier submissions of the learned Advocate-General, we do not see any reason to confine the construction of the opening words of S. 240 "Except as expressly provided by this Act" to provisions of the Act outside S. 240 itself. It is true that there are not also words in sub-s. (1) such as "sub-

ject to the provisions of this section" as are found in sub-s. (2) of S. 241 and elsewhere in the Act, but the opening words used in sub-s. (1) of S. 240 appear to us as apt to include a limitation or qualification on what follows in sub-s. (1) by provisions found later on in the same section as by provisions found elsewhere in the Act.

Next it must be remembered that an important reason in 64 I. A. 55¹ for the decision that the material provisions in the rules were directory only was the number and diversity of the rules and their liability to be changed from time to time. In sub-s. (3) of S. 240 there have been enacted provisions of very limited scope in permanent statutory form as compared with the provisions in the rules considered in 64 I. A. 55.¹ The difficulty which presented itself of allowing a cause of action to spring from one of many provisions contained in variable rules does not exist in this case. This case is in this respect perhaps nearer the case in 29 Com. L. R. 219.⁴ But the opinion of Knox C. J., quoted above is obiter, and expressed in respect of a section of which we do not know the history in the same way as we know the history of sub-s. (3) of S. 240. We know that prior to 1935 the sort of protection for the servant of the Crown provided by sub-s. (3) was merely to be found in rules, many and various and liable to change. From these rules have been picked out and enacted in the section itself certain limited specific provisions only. That course must have been adopted to strengthen the protection to be afforded to the civil servant. The Advocate-General agrees and submits that that factor is satisfied by this protection no longer being liable to alteration or diminution by merely changing a rule. Now the protection, he urges, is guaranteed against change, except by an amending Act of Parliament. That is true so far as it goes. But are we to take it that that is all that Parliament intended? That though it has now embodied in the Act itself protection of very limited effect compared to the provisions of former rules, the provision is still to be a mere empty statutory and solemn assurance and that it cannot give rise to any cause of action to the unfortunate officer dismissed or reduced in rank in flagrant breach of it. This Court has already held in 1941 F.C.R. 37⁶ that breach of sub-s. (2) does give rise to a cause of action for a declaration that the dismissal is a nullity as having been given by one without authority to dismiss.

It has been argued on behalf of Mr. Lall that equally under sub-s. (3) the authority *prima facie* empowered to dismiss is not in a position to dismiss until the conditions of sub-s. (3) have been complied with, and that any

6. (142) 29 A.I.R. 1942 F.C. 3 : I.L.R. (1942) Lah. 692 : 1941 F. C. R. 37 : 198 I. C. 7 : I.L.R. (1941) Kar. F. C. 165 (F. C.), Suraj Narain Anand v. N.-W. F. Province.

prior dismissal must be a nullity. It is this reasoning we gather that led the learned Judges in the High Court to make the declaration which they in fact made. In our judgment, the distinction which the learned Advocate-General took between sub-s. (2) and sub-s. (3) is a good one. Under sub-s. (2) no authority lower than the authority by which a civil servant was appointed has any power to execute the Crown's right of dismissal of that servant. Any purported dismissal by any such inferior authority is a mere nullity. On that view of sub-s. (2), there is no real limitation on the power of the Crown to dismiss its servants at will, provided the order of dismissal is given by the prescribed authority. An order given by any other authority is ineffective. It is difficult to apply the same reasoning to sub-s. (3). In the first place if no one is to have the power of dismissal until the conditions of sub-s. (3) have been complied with, it would seem that there must be a clear contradiction between the provisions of sub-s. (1) and sub-s. (3). There would be periods, during which the conditions of sub-s. (3) were being complied with, when some servants though holding office at the pleasure of the Crown and meriting instant dismissal could not in fact be dismissed at all by any one. Until the conditions of sub-s. (3) were complied with, there would be no one authorised to exercise the power of dismissal. On the other hand, the preferable construction may well be that the proper authority, (in the case of civil servants such as Mr. Lall, namely, the Secretary of State) has at all times the legal power of dismissal at will. An order of dismissal by him is not an order from a person who has no legal power to dismiss. He can dismiss at any time, but it may be that if he in fact dismisses without the provision of sub-s. (3) being complied with, he has acted wrongfully and the person affected may have a cause of action for wrongful dismissal. Whether this is so must depend upon the exact meaning and effect to be given to the words of sub-s. (3). In support however of this view as to the nature of the cause of action arising from breach of such a provision, we would refer to the passage in 64 I. A. 55¹ where their Lordships of the Privy Council discuss the proper remedy.

We accordingly turn to the words of the main part of sub-s. (3) of S. 240 with a view to determining more exactly their meaning. In our judgment, the words "against the action proposed to be taken in regard to him" require that there should be a definite proposal by some authority either to dismiss a civil servant or to reduce him in rank or alternatively to dismiss or reduce him in rank as and

when final action may be determined upon. It should be noted that the sub-section does not require any inquiry, any formulation of charges, or any opportunity of defence against those charges. All that it expressly requires is that where it is proposed to dismiss or reduce in rank a civil servant he should be given reasonable opportunity of showing cause against the proposal to dismiss or reduce him. It is also significant that there is no indication as to the authority by whom the action is to be proposed. It does however seem to us that the sub-section requires that as and when an authority is definitely proposing to dismiss or to reduce in rank a member of the civil service he shall be so told and he shall be given an opportunity of putting his case against the proposed action and as that opportunity has to be a reasonable opportunity, it seems to us that the section requires not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must then be given reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken. It is suggested that in some cases it will be sufficient to indicate the charges, the evidence on which those charges are put forward and to make it clear that unless the person can on that information show good cause against being dismissed or reduced if all or any of the charges are proved, dismissal or reduction in rank will follow. This may indeed be sufficient in some cases. In our judgment each case will have to turn on its own facts, but the real point of the sub-section is in our judgment that the person who is to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or omissions on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed. That in our judgment involves in all cases where there is an enquiry and as a result thereof some authority definitely proposes dismissal or reduction in rank, that the person concerned shall be told in full, or adequately summarised form, the results of that enquiry, and the findings of the enquiring officer and be given an opportunity of showing cause with that information why he should not suffer the proposed dismissal or reduction of rank.

If that be the true meaning of the section, it seems to us one to which statutory effect in the sense that breach of it will give rise to a cause of action can without any of the difficulties or inconveniences indicated in 64 I. A.

55¹ be given. It can, in our judgment, be regarded as a provision in the Constitution Act which while it does not alter the tenure of office during His Majesty's pleasure prescribed by sub-s. (1) of S. 240, or the power of dismissal at will, does impose in certain cases certain statutory obligations to be carried out before dismissal is effected, breach of which will give to the person adversely affected a cause of action. It is clear that no such opportunity as indicated above was given to Mr. Lall in this case. In spite of his repeated efforts to be informed of the results of Mr. Anderson's and Mr. Brayne's enquiries and to make representations on their reports no such opportunity was given to him. No information was given to him of the proposals of the Punjab Government or of the Federal Public Service Commission or of the Government of India that he should be dismissed. He could make no representation against such proposed action. In the circumstances of this case, the early notice contained in the charge-sheet that possibly dismissal might be decided upon is not, in our judgment, adequate compliance with the sub-section. It follows that much of the discussion as to the respective requirements of sub-s. (3) of S. 240 and R. 55 and as to whether the words "adequate opportunity of defending himself" are or are not the equivalent of the words "reasonable opportunity of showing cause against the action proposed" and as to whether Mr. Brayne duly complied with the provisions of R. 55 becomes irrelevant. In our judgment, the wording of sub-s. (3) requires something which was not done in this case. It is not necessary to determine whether R. 55 also required it generally or on the facts of this case. We have only to determine in the light of the facts of this case the true meaning and effect of sub-s. (3). In our judgment Mr. Lall was dismissed without having been afforded the reasonable opportunity of showing cause as required by this sub-section.

That leaves only the actual remedy to be considered. As indicated earlier, Mr. Lall is not, in our judgment, entitled to a declaration that he has never been dismissed or that he still remains a member of the Service. His proper remedy was, in our judgment, damages for wrongful dismissal in breach of the statutory obligations imposed by sub-s. (3) of S. 240. Mr. Lall has not asked for damages. In the High Court every one appears to have taken the view, with which we respectfully cannot agree, that his remedy, if any, would be a declaration that his dismissal was a nullity. No question of a right to damages appears to have been discussed. This no doubt followed because of the judgment of this Court and the form of the relief allowed under sub-s. (2) in

(1941) F.C.R. 37.⁶ We doubt not however that if the learned Judges or either of them had considered that in a claim for breach of the provisions of sub-s. (3) of S. 240 damages might be the proper remedy, Mr. Lall would in the circumstances of this case have been given leave to amend and claim damages notwithstanding the length of time that had expired after his wrongful dismissal. Mr. Lall and every one in our view, mistook the proper remedy for the reasons indicated. In these circumstances this may well be regarded as an exceptional case, where to secure justice, leave to amend should be given at this late stage. We are the first appellate Court in this case and we would ourselves give leave to amend and attempt to assess the damages, had there been proper materials for assessing damages before us. In the circumstances, we propose to make a declaration that for the order of the High Court there shall be substituted an order declaring that Mr. Lall was wrongfully dismissed on 4th June 1940 in breach of the statutory obligations imposed by sub-s. (3) of S. 240, and remit the case to the High Court to take such action in regard to any application by Mr. Lall for leave to amend to claim damages, and the assessment of such damages as to the High Court shall seem right in view of this judgment and our remarks herein. In our judgment in the circumstances Mr. Lall is entitled to his taxed costs of this appeal and we order accordingly.

We might add, however, that we have had the opportunity of reading the judgment about to be delivered by our brother Varadachariar and we would state that if, as he holds, the requirements of sub-s. (3) of S. 240 demand nothing beyond what is required for compliance with the provisions of R. 55, we would agree with him in the conclusions which appear to him to be the right ones to draw upon a full examination of the facts in this case.

Varadachariar J. — I agree that the Secretary of State had authority to remove the plaintiff from the Indian Civil Service (issue 1). I shall assume that, if the plaintiff had been dismissed without giving him a reasonable opportunity of showing cause against it, he would be entitled to seek redress in a Court of law (Preliminary issue, issue 2 and the latter part of issue 5). It would follow that the Court would be entitled to determine whether the opportunity given was reasonable or not (issue 6). Two questions then remain for decision; the first relates to the nature of the opportunity required by law to be given (issue 3); this turns on the interpretation of S. 240 (3), Constitution Act; the second relates to the nature of the opportunity actually given

to the plaintiff (issues 4 and 5); this turns not so much on the appreciation of the evidence—which is in the main documentary and undisputed—as on the proper inference to be drawn from the evidence. It is not necessary to deal with issues 7 and 8 separately, because the findings of the High Court on these issues do not take the plaintiff further than the finding on issues 4 and 5.

I regret, I am not able to concur in the interpretation which my Lord and my learned brother place upon cl. (3) of S. 240, Constitution Act. Though that provision was first enacted in the Statute itself only in 1935, a similar safeguard was previously contained in Statutory Rules framed under S. 96-B, Government of India Act of 1919. There had been for sometime a conflict of decisions in this country as to whether a public servant dismissed from his office without an enquiry held in accordance with these rules had a remedy by civil action or not. In 1936, the Judicial Committee decided that he had none, 64 I. A. 55.¹ The Constitution Act of 1935 was passed before this decision. Rule 55 of the Rules in force at the time comprised three parts, one which enunciated the general principle that no order of dismissal, removal or reduction should be passed on a member of a service, unless he had been informed in writing of the grounds on which it was proposed to take action and had been afforded an adequate opportunity of defending himself; a second which dispensed with this requirement in certain cases; and a third which prescribed in some detail the procedure by which the general principle first enunciated was to be given effect to. This rule formed part of a group headed "Conduct and Discipline" beginning with R. 47 and these rules provided for "disciplinary action" in respect of members of the six classes of services specified in R. 14. Rule 49 enunciated seven kinds of penalty or punishment and R. 55 was applicable only to three of these penalties, viz., dismissal, removal or reduction. The Constitution Act of 1935 provided (by S. 276) for the pre-existing rules continuing in operation (so far as they were consistent with the new Act) but it thought fit to make provision in the Statute itself in respect of some of the matters dealt with in R. 55. A comparison of cl. (3) of S. 240 with the rule will show that (subject to certain differences of wording to which I shall presently refer) the general principle of notice and opportunity for defence as well as the exceptions to its application have been incorporated in the Statute itself while the details of the procedure by which the principle is to be given effect to are allowed to remain matters for rules.

The new method of providing the safeguard for the services will certainly have one important consequence, namely, that it will place it beyond the power of the rule-making authority to deprive the services, by any change in the rules of the benefit of the general principle of notice and opportunity for defence. It may also have another result—and, as stated at the outset, I assume it to be so for the purposes of this case—namely that the dismissal of an officer without giving him such opportunity may entitle him to seek redress in a Court of law. The decision to the contrary in 64 I. A. 55,¹ rested in some measure on the ground that it could hardly have been intended to allow the statutory declaration of tenure "at the pleasure of the Crown" to be qualified or restricted by rules which were expected to provide for a variety of matters of different degrees of importance. A provision like cl. (3) made in the Statute itself may with greater force be claimed to be a qualification of or even a part of the declaration contained in cl. (1) of the same section as to the nature of the tenure. Assuming this to be so, the further questions for determination in this case are: (i) what is the nature of the opportunity which on the true construction of cl. (3) should be given to the officer concerned—is it the same as that required by R. 55 or is it substantially different and (ii) whether such opportunity has in fact been given to the plaintiff in this case. The first question would not arise for discussion in this appeal if I were able to accept the finding of the High Court on issue 4, to the effect that the plaintiff was not given an adequate opportunity even in accordance with R. 55. Adequacy of opportunity within the meaning of S. 240 (3) was made the subject of a separate issue (No. 5); but the learned Judges of the High Court have not proceeded on the footing that there was a difference between the nature of the opportunity required by R. 55 and the nature of the opportunity contemplated by S. 240 (3); indeed they definitely reject the plaintiff's contention that he should have had two opportunities, one at the stage of enquiry and the other at the stage of the determination of the appropriate punishment. The two issues seem to have been raised separately, only in view of the possible difference in legal result between the two cases, viz., that a violation of R. 55 may not entitle the aggrieved officer to seek redress in a Court of law but a violation of the statutory condition prescribed by cl. (3) of S. 240 may furnish a cause of action for a suit. So far as the question of fact is concerned, the learned Judges have dealt with the two issues together. For reasons to be stated presently I find myself unable to con-

cur in the finding of fact recorded by the High Court on issues 4 and 5.

It is in this view that it becomes material to consider whether the question of compliance with cl. (3) of S. 240 has to be judged by a different test from that applicable to R. 55. If, as a matter of law, it should be held that the plaintiff should have been given an opportunity, after Mr. Brayne had submitted his report, to show cause against that report, it was not the defendant's case and the evidence does not therefore establish that such opportunity was given. It has been contended by the plaintiff that the difference in language between R. 55 and S. 240 (3) involves a difference in the test applicable under the two provisions. I am of the opinion that the verbal difference has only arisen from a difference in the method of drafting and does not involve or imply a difference in substance. In R. 55 one of the exceptions was expressed parenthetically, by the words "other than an order based on facts which have led to his conviction in a criminal Court" and the other exception was stated separately, in para. 2 of the rule. This was apparently considered capable of improvement; accordingly when embodying the provision in the statute, the two exceptions were brought together and with some verbal changes (not now material) they were enacted as provisos (a) and (b) to cl. (3). The rule refers to three kinds of punishment, viz., dismissal, removal or reduction; cl. (3) refers only to dismissal or reduction, because by an interpretation clause (S. 277) applicable to the whole of Part 10, Constitution Act, "dismissal" has been made to include "removal." The change on which particular stress has been laid in support of the plaintiff's case is the substitution in the statute of the words "reasonable opportunity of showing cause against the action proposed to be taken" for the words

"unless he has been informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself."

It seems to me that the statute has adopted that language only with a view to express the principle with greater brevity, as the details were expected to be provided for by the rules. The subsequent part of R. 55, which prescribes how the information of the grounds is to be given and shows what is meant by adequate opportunity of defence fits in as much with the phraseology of cl. (3) of S. 240 as with the language of R. 55 and I see no reason to think that R. 55 is inconsistent with S. 240 (3) and must be held to be no longer in operation. It has been contended that the language of cl. (3) of S. 240 would be satisfied only if an oppor-

tunity to show cause were given after the authority concerned had received the report of Enquiring Officer and was in a position to make up its mind as to the action to be taken thereon, viz., whether the punishment was to be one of dismissal or only reduction. It has been further contended that such opportunity cannot be regarded as "reasonable" unless the officer against whom proceedings are being taken is given an opportunity of perusing the report of the Enquiring Officer or is at least informed of his findings and is then given an opportunity to argue against those findings. I am unable to read all this into the substituted words.

The plaintiff's contention was also stated in another form. It was said that S. 240 (3) must have contemplated cause being shown to the authority competent to dismiss the officer and as, in the present case, that authority was the Secretary of State, it followed that opportunity should have been afforded to the plaintiff to show cause before the Secretary of State after Mr. Brayne had made his report and the Punjab Government had made its recommendation. Section 240 (3) is of general application to all officers and is not limited to members of the All-India Services. If, in any case, cause is shown before the Enquiring Officer, any representation which the officer charged may make will form part of the record and will presumably be considered in due course by the authority finally dealing with the matter. Further, the time-factor is not the material point in this case; it appears from the report of the Federal Public Service Commission to which the matter was referred under S. 266 (3) (c), Constitution Act, that a representation was made by the plaintiff to that Commission. This was after Mr. Brayne had made his report and the Punjab Government had made its recommendation. The real question is whether the plaintiff had a right to be informed of Mr. Brayne's findings and of the grounds therefor, before making his representations.

It is clear that the framers of cl. (3) of S. 240 had the language of R. 55 before them. According to the elaborate procedure prescribed by the latter part of the rule, what was required was that the charges should be communicated to the person charged, with a statement of the allegations on which each charge was based and of any other circumstances which it was proposed to take into consideration in passing orders on the case. The officer charged can put in a written statement of his defence, ask for an oral enquiry if he so desires and also ask to be heard in person. The Enquiring Officer was expected to make a record of the evidence and to state

his findings and the grounds thereof. It is obvious that the rule did not contemplate the officer charged being given a copy of the finding of the Enquiry Officer and permitted to canvass its correctness. It cannot be denied that the steps provided for in R. 55 will be equally necessary under S. 240 (3), for the officer concerned cannot be held to have had a reasonable opportunity unless he had been informed of the charges against him and had been allowed to put forward his defence and to take part in the enquiry. Is there anything in the language of cl. (3) to indicate that anything more or anything different was contemplated or to suggest that a further opportunity was to be given after the enquiry had been completed in the presence of the officer charged and the Enquiring Officer had made his report? I find none; and I venture to think that if such an additional step had been intended, such intention would have been more clearly indicated. The words "against the action to be taken" found in the clause only expressed in another form the effect of the words "on which it is proposed to take action" found in two places in the rule. I am unable to accept the suggestion that the words of the statute are appropriate only to the stage when the authorities are in a position to indicate definitely what action they intend to take, viz., whether it is to be one of dismissal or one of reduction and this can be predicated only after the Enquiring Officer has made his report. The word 'proposed' seems to me to militate against this contention. Even in the view that opportunity is to be given after the report, the decision as to the particular action to be taken can be reached only later, that is, after hearing what the officer charged has to say against the findings of the enquiring officer. It will be equally appropriate to speak of "action proposed to be taken" even at the stage of communication of the charges, the implication being that action appropriate to the charges will be taken unless the charges are rebutted. That this is practicable is shown by the form of the charges communicated to the plaintiff in this case. Under each charge, the evidence relating to it was briefly indicated and the notice concluded,

"the above facts are sufficient to prove that he has abused his position He should show cause why he should not be dismissed, removed, reduced or subjected to such other disciplinary action as the competent authority may think fit to enforce"

The concluding words as to the nature of the punishment had to be in that alternative form because there was always the possibility that the officer charged might rebut the charges or reduce their seriousness and the ultimate de-

cision rested with the Secretary of State (as the plaintiff belonged to an All-India Service) while the notice was given by and the enquiry conducted under the orders of the Provincial Government. The notice, however, certainly contains an indication of the action proposed to be taken and an invitation to show cause against it. It has been elicited from Mr. Bourne (P. W. 1) that in one case a fresh notice was served on the officer charged, after the Enquiring Officer had submitted his report. The practice seems to have varied from time to time. A note slip added to R. 55 (in the P. & T. Edition of the Fundamental and Supplementary Rules) records a decision of the Secretary of State (No. 677) dated 28th May 1933, to the effect that

"the technical requirements of S. 240 (3), Government of India Act, will be complied with if, when an officer is called upon to offer the defence in respect of the charges against him he is also asked at the same time to show cause against the imposition of the penalty considered *prima facie* to be appropriate should the charges against him be held to have been proved it should in such cases be made clear to the officer concerned that any representation that he might make in regard to the action to be taken against him in the event of all the charges or any of them being held to be proved will be considered by the final authority concerned before any order punishing him is passed."

As the statutory provision itself is very recent, this is not a case in which practice, even if uniform, can be called in aid in the interpretation of the Statute. The plaintiff contended that the Provincial Government had no authority to initiate an enquiry into the conduct of a member of an All-India Service. This contention is untenable. Even members of an All-India Service are, when they serve in a Province, subject to the authority and the rule-making power of the Governor, except in so far as rules made by the Secretary of State provide otherwise (S. 247, Constitution Act and R. 52, Secretary of State's Rules); and R. 50 only provides that no member of an All-India Service shall be removed or dismissed except by order of the Secretary of State (I omit the words "in Council" as no longer relevant.) The plaintiff also urged that the Punjab Government had no power to direct a further inquiry by, Mr. Brayne when Mr. Anderson had already held an inquiry into the charges against the plaintiff and submitted his report. This contention is also untenable. The matter of the inquiry is primarily one for the decision of the executive authority. In the present case, Mr. Anderson himself felt that for want of time he could not complete the inquiry and though he expressed his views on the materials then before him, he recommended to the Government to treat his inquiry as only a preliminary inquiry

and to depute some officer to make a complete investigation. This is what Mr. Brayne was directed to do.

I now proceed to deal with the findings of the High Court on the question of fact raised by issues 4 and 5. The Advocate-General of India applied for and was granted leave to argue this question and we have heard full arguments thereon from both sides. It has to be emphasised at the outset that the Court has no right to examine the correctness of the inferences drawn or conclusions reached by the inquiring officer or by the responsible authorities. It follows that any opinion that the Court may form on these points or on the appropriateness of the punishment meted out to the officer cannot be allowed to influence the consideration of the only point open to examination by the Court, namely, the adequacy of the opportunity afforded to the plaintiff. The learned Judges of the High Court recognised this limitation on the Court's power; but some of their observations read very much like stating that on certain points the materials before Mr. Brayne did not warrant the adverse inference which he drew. The course of the inquiry and the relevant portions of the correspondence have been referred to in detail in the judgment of my Lord and it is unnecessary for me to re-state them here. The finding of the High Court on issues 4 and 5 is based on the following four grounds: (A) that as the plaintiff was denied copies of Mr. Anderson's report and of the directions given by the Government to Mr. Brayne, he was not fully able to grasp the method and the scope of Mr. Brayne's inquiry and to fully appreciate the implications of the material which was used against him; (B) that as Mr. Brayne did not communicate to the plaintiff the impressions which the new documents produced on his mind and did not put questions to him with reference thereto, Mr. Brayne has caused great prejudice to the plaintiff and deprived him of the opportunity of explaining away whatever appeared against him; (C) that by declining to adjourn the inquiry to January 1939 and by hustling inquiry, the inquiring officer has greatly embarrassed the plaintiff and made it difficult for him to present his defence properly; (D) that Mr. Brayne was receiving evidence behind the back of the plaintiff (this is suggested rather than stated).

With all respect to the learned Judges, I am of the opinion that the evidence does not establish any of the above grounds. I shall take the grounds seriatim:

A. It is not for me to say whether it would not have been proper for the Punjab Government to furnish the plaintiff with a copy of Mr. Ander-

son's report and of the direction issued by the Government to Mr. Brayne in connection with the further inquiry to be held by him. Now that both these documents are on the record, I am satisfied that so far as the scope and method of the further inquiry were concerned Ex. H. P.-21, the letter which Mr. Brayne wrote to the plaintiff on 29th November 1938, gave the plaintiff all the information which he could have obtained from Mr. Anderson's report and the Government's order to Mr. Brayne. This letter was written in reply to Ex. H. P.-19 from the plaintiff to Mr. Brayne, dated 24th November 1938. Plaintiff asked "I wish, however, to know on what points have you to complete the inquiry." To this Mr. Brayne replied:

"At Multan I propose to study the seniority list and candidates register and the service-books of those employees and candidates mentioned in the chains of changes in which Sunder Das figures. I also propose to look at other establishment cases dealt with by you between October 1936 and March 1937, both to see how many there were and how they were reported on and dealt with in comparison with those concerned with my inquiry. For similar purposes of comparison, I shall also look at entries made by you in character rolls. There are other papers I shall try to see, such as the reversion by Mr. Bedi of Sunder Dass in the summer and his reappointment by you at the end of October, the other Sunder Das' transfer to Alipore, and the inspection notes of the Courts in which the five clerks who appealed were employed as referred by you in your statement to Mr. Anderson."

This letter, read in the light of the charges which had already been communicated to the plaintiff, gave him a clear idea of the nature of the inquiry which Mr. Brayne proposed to hold of the kind of documents which he proposed to examine and the purpose for which he intended to do so. The learned Judges of the High Court themselves referred to this document as one of importance and reproduced it in full in their judgment; but they have not compared it with the concluding portion of Mr. Anderson's report and the concluding portion of the Government's order to Mr. Brayne to see that this letter contained all the information which could have been gathered from the report and the Government's order, as to the nature and purpose of the further inquiry. At the end of the report Mr. Anderson said:

"To take one small point. I am asked to conclude that because Mr. Lall made four adverse comments in four character rolls, he was animated by improper motives. Before coming to any such conclusion, it would obviously be necessary to have some standard to know what sort of remarks Mr. Lall is in the habit of recording in character rolls, and to inquire on the spot into the circumstances in which he recorded remarks."

It is with reference to this remark and one or two other similar remarks that the Government told Mr. Brayne: "You will gather

from Mr. Anderson's report on what points further inquiry is necessary." Mr. Brayne in his letter to the plaintiff did not refer to the other points of inquiry suggested in Mr. Anderson's report, apparently because he did not consider it necessary to go into them. For instance, Mr. Anderson suggested that it might be necessary to examine two of the Judges of the High Court; Mr. Brayne thought it unnecessary. Even before us, the plaintiff could not explain what light those Judges could have thrown on any part of the case against him. Again, Mr. Anderson suggested that evidence should be taken as to whether Alipore to which two of the offending clerks had been transferred was a Penal Station; but it was clear even from the plaintiff's answer to Charge No. 7 that the two clerks, Ishwar Das and Khem Chand, were sent to Alipore only as a 'disciplinary measure' because they were 'mischievous' men and he added: "If he were a very good man, he would not be posted at Alipore." On this statement, it was obviously unnecessary to take any further evidence as to the result or purpose of posting the clerks to Alipore. In their letter to Mr. Brayne the Punjab Government had further said:

"It will be as well if you go into the chain of promotions which resulted in Mr. Lall's order of 22nd March 1937, appointing Sunder Dass a paid candidate and see if it is an order."

This direction also was communicated to the plaintiff by Mr. Brayne in H. P.-21. I am accordingly unable to agree that any prejudice was caused to the plaintiff by the order of the Government declining to furnish him with copies of Mr. Anderson's report and its direction to Mr. Brayne. It is true that the plaintiff took strong exception to there being any further inquiry at all. As stated by him in his letter to Mr. Brayne dated 18th December 1938 and further elaborated by him in his deposition in the suit, his position was that Mr. Anderson had completed his inquiry and practically exonerated the plaintiff of all the serious charges. Referring to Ex. D.-2 (which is the same as Ex. H. P.-21) he deposes: "My reaction to this was that what Mr. Brayne proposed doing at Multan was wholly outside the scope of an inquiry prescribed by R. 55 and I also had a doubt whether he had been ordered by the Government to hold an inquiry of this type or that the Government or the Governor had any executive authority to order such an inquiry. This letter, (Ex. D.-2) did not appear to me to be an adequate answer to my letter of 24th December 1938."

One may sympathise with the plaintiff's annoyance but he was not right in his view of the law and as to the powers of the Punjab Government. In any event, such objections are very different from the contention that he had not been informed of the method or

scope of the proposed inquiry by Mr. Brayne.

B. Exhibit H. P.-21 itself gave the plaintiff a fair idea of the nature of the evidence that Mr. Brayne proposed to examine and of the purposes for which he intended to do so. Even if it could be said that the letter did not by itself give sufficient information to the plaintiff, the matter is placed beyond doubt by what happened on 20th December. In his letter of 18th December 1938 (para. 6) the plaintiff complained:

"When I appeared before you at Multan (on 9th December) I did not know what documents you had studied, and how you had been influenced by them. These documents are not mentioned in any of the charge-sheets with which I have been supplied. I do not know to which particular charge they appertain. I also do not know how they are relevant to the inquiry. . . . I do not know whether the study of seniority list, etc., is for the purposes of investigation, or there are any definite allegations which bear on the charges and which are sought to be proved by these documents. If so, I have not been informed of them and hence I am unable to rebut them."

This paragraph is important in appreciating what happened when the plaintiff and Mr. Brayne met on 20th December. The proceedings of that day are recorded in Ex. D.-7. Paragraph 1 states: "I have explained to Mr. Lall the relevancy of the new documents of which copies have been sent to him." In his evidence in the suit, Mr. Brayne explained that by these words he meant that he had explained the bearing that those documents had on the charges framed against him. He adds:

"As an instance, I explained to him why I had collected the character rolls of 42 people and told him that I wanted to see whether the entries made against the four persons in this case were ordinary entries usually made by him or they were exceptional entries."

Nothing has been suggested in the course of the evidence to throw any doubt on the truth of the statement of Mr. Brayne. Assuming that the plaintiff, who had called Mr. Brayne as his own witness, was in some embarrassment about cross-examining him, the plaintiff, who gave his evidence after Mr. Brayne had been examined, has not said that the story is not true. All that he says is that Ex. D.-7 was not recorded in his presence but he admits that he received a copy of D.-7 on 22nd December and he never disputed the correctness of the statement with which it opens. For a full appreciation of the significance of what happened on 20th December, it is also necessary to refer to what happened between 9th December and 18th December. On the 9th Mr. Brayne has recorded (H. P.-29): "Further documents collected were shown to Mr. Lall," and he adds a note of plaintiff's request

"that he may be given adequate time to understand his position. Meanwhile he requests that he may not be asked any questions with regard to these new documents or the case in general."

I am unable to accept the plaintiff's statement that on 9th December the documents were not there and that they were not shown to him. As usual, a copy of the order of 9th December was given to him shortly thereafter; he admits in his deposition that he had a copy of the order with him when he wrote his letter of 18th December 1938 and he did not contest the truth of this statement. The concluding portion of Ex. H. P.-29 said "copies of the relevant parts of the new document will be sent to him immediately by post." On 11th December 1938, Mr. Brayne wrote Ex. H. P.-65 to the plaintiff; it says:

"Herewith copies of relevant parts of the new papers collected (*vide* list attached); if you wish to see original on 20th, please let me know in ample time, as some of them have been returned Two papers will follow tomorrow."

This letter was accompanied by copies of a large number of documents. In his letter of 18th December (para. 5) the plaintiff admits having received these copies on the 12th and 16th and he refers to them as "copies of documents that you had studied at Multan." That the plaintiff must have carefully gone through these copies is shown by Exs. H. P.-31 and H. P.-31A dated 18th December. This sets out a letter from the plaintiff dated 15th December 1938, and gives by way of marginal notes Mr. Brayne's answers to a number of queries made by the plaintiff with reference to some of the documents of which copies had been sent to him. H. P.-34, a letter from the plaintiff to Mr. Brayne dated 23rd December 1938, is also significant. It acknowledges receipt of a copy of Mr. Brayne's order apparently Ex. D.-7 and proceeds to say:

"I want to see whether representations or petitions of some of the clerks were received by Chaman Lall by post as stated by him, or were presented to him in person. I want to see the endorsement on each petition. I also consider it necessary to verify the dates. It may also be necessary to see the note of Chaman Lall dated 2nd or 3rd March, regarding copies."

This letter shows that various details of the case were receiving the closest attention of the plaintiff all the time. The learned Judges make a point of the fact that no reply in writing was sent to plaintiff's letter of 18th December. That was obviously due to the fact that the whole situation was cleared up when Mr. Brayne met the plaintiff on the 20th and that is what D.-7 records. The plaintiff's query (in his letter of 18th December) as to whether the new documents relate to the old charges or whether there are any definite allegations which bear on the charges, etc., is to say the least disingenuous, because the purpose and

use of these new documents have been explained to him in Ex. H. P.-21. Anyhow the matter was made clearer by the explanation given by Mr. Brayne on 20th December.

There is little substance in the argument that the plaintiff has been prejudiced because no questions were put to him with reference to the new documents nor any information given to him as to the inferences which Mr. Brayne was inclined to draw from these documents. The evidence already referred to in some measure furnishes the answer. On 9th December, the plaintiff requested that he might not be asked any questions with regard to the new documents (as recorded in Ex. H. P.-29). Between 12th and 20th December, he had been furnished with copies of relevant portions of these documents and had studied them. On 20th December, the interview lasted about three hours and Ex. D.-7 records "Mr. Lall has addressed me about the case." This must relate to the "merits" because the earlier paragraphs of the order deal with the objections to "procedure." Plaintiff in his evidence admits that "on 2nd January, Mr. Brayne discussed one document with me." His only apprehension was that Mr. Brayne "might have several more documents of which I had no knowledge." The report is not based on any documents not disclosed to the plaintiff. Even assuming that no questions had been put to the plaintiff by Mr. Brayne with reference to the disclosed documents, it has to be remembered that the charges served on the plaintiff had themselves indicated the *prima facie* inference which the documents there referred to interpreted in the light of the surrounding circumstances, suggested. The further inquiry was undertaken, on the suggestion of Mr. Anderson, only to see whether the *prima facie* adverse inference to be drawn from plaintiff's conduct was rebutted either by any evidence in justification of the plaintiff's conduct or by any evidence showing that the plaintiff was usually severe and rough in dealing with all his subordinates. The later evidence is thus not in any sense incriminating evidence or evidence intended to prove the charges; it was rather in the nature of evidence calculated, if possible, to exculpate the plaintiff. That the plaintiff was himself aware of the value of that kind of evidence is shown even by his answers to the charges. Thus, in answering charge No. 7, he refers to the remarks made by his predecessor regarding Khem Chand (one of the clerks punished by him) as proof that that clerk was really deserving of punishment; in respect of one or two other clerks he mentions having heard that they were making money by supplying copies of records privately to the applicants. In his statement before Mr.

Anderson, he said (dealing with Charge No. 6) that he had heard complaints against some of them and made inquiries about them from Ch. Radha Kishan a leading lawyer of Multan. Such items of evidence are in the nature of justification or exculpation; but the plaintiff stated at the outset that he did not want any oral inquiry and he never afterwards asked for any of his alleged informants being examined. This certainly does not show that he did not understand the bearing or value of such evidence. I am unable to appreciate the force of the argument (based apparently on S. 342, Criminal P. C.) that it was Mr. Brayne's duty to question the plaintiff with reference to what appeared against him in the evidence. The new documents were in no sense evidence adverse to the plaintiff. They only failed to remove the *prima facie* adverse inference which the plaintiff's conduct interpreted in the light of the surrounding circumstances suggested.

C. It is true that when the plaintiff received a letter from Mr. Brayne suggesting that the inquiry might start early in December, the plaintiff expressed a desire to have it started after the Christmas. But we hear nothing further about this thereafter and whatever personal inconvenience this might have involved to the plaintiff (specially because of his touring duties about this time), there is no trace in the evidence of anything like embarrassment to the plaintiff on this account. He no doubt felt annoyed or (as he said) even humiliated by the thought that there was to be a further inquiry at all and this might have naturally upset him but that is a different matter. If his touring duties interfered with the conduct of his defence, we find no such complaint and he made no attempt to take leave to enable him to conduct his defence properly. Indeed, when one bears in mind the nature of Mr. Brayne's inquiry, there was really not much for the plaintiff to do beyond what the evidence shows that he has done. There is no force in the argument that Mr. Brayne did in 2 or 3 days what Mr. Anderson expected might take 15 days to do. We have no means of knowing what Mr. Anderson intended to do; but the plaintiff has not shown and we have not been able to see what there was in the case that required more time than Mr. Brayne actually spent on it. An observation of the learned Judges suggests a possible misreading of one of the paragraphs of Ex. D-7. They seem to accept the plaintiff's contention that "even on 20th December . . . documents were still in course of collection." The reference in Ex. D-7 to "the documents sent for" is, I think, to the two documents referred to earlier as asked for by the plaintiff. The last paragraph itself shows that if they

had contained anything material, plaintiff would have been allowed to say what he wished to say about them. Presumably they contained nothing and we therefore hear nothing more about them. The correspondence shows that Mr. Brayne gave to the plaintiff every facility that it was in his power to give and never refused any request made by the plaintiff except when higher authority prevented his complying with such a request.

D. I have not been able to understand what the learned Judges had in mind, when they spoke of a possible view that "Mr. Brayne was receiving evidence behind the back of the plaintiff." The observation is made when they refer to a confidential notebook kept by the plaintiff and referred to in Mr. Brayne's report. Even assuming (as hinted by plaintiff) that this book could not have remained in the court-house but must have been given to Mr. Brayne by Chaman Lal, nothing turns on it, so long as no question has been raised as to its genuineness nor as to the plaintiff's knowledge of its existence or its contents. The book itself contains only a few entries and copies of all the entries were sent to plaintiff along with Ex. H.P.-65 (it is item 23 of the list attached to that letter). There is nothing in the document to tell against the plaintiff and it is not correct to speak of Mr. Brayne using it against the plaintiff. It contains no more relevant information than is found in plaintiff's statement before Mr. Anderson in respect of charge No. 6. If anything, it is more favourable to him in that it includes Akbar Ali the Examiner among his informants. Mr. Brayne's characterisation of the information therein contained as "hearsay" is confirmed by one of Mr. Lall's own entries (which formed the basis of the charge), where speaking of disciplinary action against the clerks he adds: "I also have heard complaints against them." I do not see that it was Mr. Brayne's duty to ascertain what inquiries Mr. Lall had made about the character of these clerks, when Mr. Lall himself did not ask his informants to be examined. Whether or not Mr. Brayne drew the right inference from these entries is not a matter for the Court. Even if it should be held that Mr. Brayne should have examined certain witnesses before coming to certain conclusions that would not amount to a denial of opportunity to the plaintiff to show cause, unless the plaintiff had desired those witnesses to be examined but they were nevertheless not examined.

I have discussed the main grounds set forth in support of the High Court's finding and I do not ignore the possibility that though each circumstance may not be serious by itself,

their cumulative effect may be considerable. I think the circumstances of the case do not individually or collectively warrant the conclusion that the plaintiff has not had a reasonable opportunity of showing cause against the charges during the time of Mr. Brayne's inquiry. It must be remembered that after all there is little complexity about the case; the plaintiff pleaded guilty to charges 1 and 2 and even as to charge 3, he admitted the relevant facts though he pleaded that he acted under a mistake; on charge 4 he has been exculpated. As to charges 5 to 8, there is no dispute about the facts themselves; the only question was whether, as the circumstances suggested, the plaintiff acted vindictively against the clerks concerned, because they had questioned the plaintiff's partiality to his wife's relation or whether he had other reasons or justification for dealing with them in that manner. It is difficult to appreciate the force of the argument that the plaintiff who had been a District and Sessions Judge himself did not understand the bearing of various facts and circumstances on one aspect or the other of the case. As I am of the opinion that the finding on issues 4 and 5 should be against the plaintiff, it would follow that he is not entitled to any relief in this suit.

By the Court. — In accordance with the opinion of the majority of the Court, it is ordered that, in place of the order of the High Court, there shall be substituted an order declaring that the plaintiff Mr. Lall was wrongfully dismissed from the Indian Civil Service on 4th June 1940, but such substituted order shall not affect the order as to costs made by the High Court and it is further ordered that the case be remitted to the High Court with a direction that the High Court do take such action in regard to any application by Mr. Lall for leave to amend to claim damages as to the High Court shall seem right in view of the judgment of, and the remarks contained in the judgment of, the majority of this Court. Except as aforesaid, the appeal of the Secretary of State for India is dismissed with costs, such costs to be taxed by the Taxing Officer of this Court. The cross-objections are dismissed. No order is made as to the costs of the cross-objections. Leave to appeal to His Majesty in Council refused.

G.N.

*Order accordingly.***A. I. R. (32) 1945 Federal Court 67***(From Calcutta : ('45) 32 A. I. R. 1945 Cal. 488)*

9th April 1945

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.*Biswanath Khemka — Appellant*

v.

Emperor.

Criminal Appeal No. 1 of 1945.

(a) Government of India Act (1935), S. 256 — Authority to be consulted under S. 256 — What is.

The authority to be consulted in pursuance of the direction contained in S. 256 is the District Magistrate of the district in which the person concerned is working at the time when the recommendation is made or the Chief Presidency Magistrate if the person concerned is at that time working under him.

[P 68 C 1]

Services of a Magistrate were borrowed from another province, and on these being placed at the disposal of the Bengal Government, he was appointed Additional Presidency Magistrate at Calcutta. It was contended that the appointment was ineffective as it was made without consulting the Chief Presidency Magistrate, Calcutta :

Held that the consultation prescribed by S. 256 should have been made with the District Magistrate of the District in which the Magistrate was working in his own Province at the time when the question of his appointment as Additional Presidency Magistrate, Calcutta came under consideration. In the absence of anything to indicate that such consultation did not take place, there was no foundation for the contention that the direction contained in S. 256 was not complied with : View of Ormond J. in ('45) 32 A. I. R. 1945 Cal. 488, *Affirmed*. [P 68 C 1, 2]

(b) Government of India Act (1935), S. 256 — Direction for consultation is directory and not mandatory.

The direction as to consultation laid down in S. 256 is directory and not mandatory and non-compliance with it would not render an appointment otherwise regularly and validly made ineffective or inoperative : 1917 A. C. 170, *Rel. on*; ('45) 32 A. I. R. 1945 Cal. 488, *Affirmed*. [P 68 C 2]

Sardar Sant Singh, Advocate, Federal Court,
instructed by Ganpat Rai, Agent —

for Appellant.

B. Banerjee and N. K. Sen, Advocates, Federal Court,
instructed by P. K. Bose, Agent — for Respondent (the Government of Bengal).

Zafrulla Khan J. — The appellant along with six other persons is being tried before an Additional Presidency Magistrate, Calcutta, on charges of hoarding and profiteering under R. 81 (4) read with R. 122, Defence of India Rules. During the course of the trial he applied to the Chief Presidency Magistrate, Calcutta, for transfer of the cases from the file of the trying Magistrate. One of the grounds urged in support of the application for transfer was that the appointment of the Magistrate was irregular and therefore ineffective, as it had not been made in accordance with the conditions prescribed by S. 256,

Constitution Act, and that therefore the Magistrate had no jurisdiction to try these cases or indeed any case at all. The application was dismissed by the Chief Presidency Magistrate. The appellant thereupon moved the Calcutta High Court in revision with no better result. This appeal was preferred against the order of the Calcutta High Court supported by the requisite certificate under S. 205, Constitution Act. The sole question argued before us related to the interpretation and effect of S. 256, Constitution Act, which runs as follows:

"No recommendation shall be made for the grant of magisterial powers or of enhanced magisterial powers to or the withdrawal of any magisterial powers from, any person save after consultation with the District Magistrate of the district in which he is working, or with the Chief Presidency Magistrate, as the case may be."

It was contended that the appointment of the Additional Presidency Magistrate trying these cases was made without consulting the Chief Presidency Magistrate, and was therefore ineffective and inoperative. In our judgment the section does not direct consultation with the Chief Presidency Magistrate when it is proposed to grant magisterial powers or enhanced magisterial powers to a person who is not at the time when the recommendation is made, working as a Presidency or Additional Presidency Magistrate. The authority to be consulted in pursuance of the direction contained in the section is the District Magistrate of the district in which the person concerned is working at the time when the recommendation is made or the Chief Presidency Magistrate if the person concerned is at that time working under him. In this case the services of the Magistrate concerned were borrowed from another province, and on these being placed at the disposal of the Bengal Government, he was appointed Additional Presidency Magistrate at Calcutta. In these circumstances we are of the opinion that the consultation prescribed by S. 256 should have been made with the District Magistrate of the district in which the Magistrate was working in his own province at the time when the question of

his appointment as Additional Presidency Magistrate, Calcutta, came under consideration. There is nothing on the record to indicate that such consultation did not take place. There is thus no foundation for the contention that the direction contained in S. 256 was not complied with.

We are further of the opinion that the direction laid down in S. 256 is directory and not mandatory and that non-compliance with it would not render an appointment otherwise regularly and validly made ineffective or inoperative. It seems to us that any other view would lead in many cases to results which could not have been intended by Parliament and would entail general inconvenience and injustice to persons who have no control over those entrusted with the duty of making recommendations for the grant of magisterial powers: see *Montreal Street Railway Co. v. Normandin*.¹

A preliminary objection was taken on behalf of the Crown that the appeal was incompetent inasmuch as the order of the High Court appealed against was not a judgment or final order within the meaning of S. 205, Constitution Act. Reliance was in support of the objection placed on the observations of Sulaiman J., in *Hori Ram Singh v. Emperor*.² Reference was also made to *Venugopala Reddiar v. Krishnaswami Reddiar*.³ As we have come to the conclusion that there is no substance in the appeal on the merits, we do not consider it necessary to deal with the preliminary objection. No other question was sought to be raised before us. The appeal fails and is dismissed.

G.N.

Appeal dismissed.

1. ('17) 4 A.I.R. 1917 P. C. 142 : 1 917 A. C. 170 : 86 L. J. P. C. 113 : 116 L. T. 162 (P.C.).
2. ('39) 26 A.I.R. 1939 F. C. 43 : I.L.R. 1940 Lah. 400 : I.L.R. 1939 Kar. F. C. 132 : 1939 F. C. R. 159 : 181 I. C. 317 (F.C.).
3. ('43) 30 A.I.R. 1943 F. C. 9 : I.L.R. (1943) Kar. F. C. 17 : 22 Pat. 428 : 1943 F. C. R. 33 : 206 I. C. 387 (F.C.).

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